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Supreme Court of the United States

OCTOBER TERM 1956

No. 248

WOODROW W. HOOD, PEGGY ANN HOOD, LEVER RAY, IRMA RAY, HENRY LOWREY, AND RUTH LOWREY, PETITIONERS,

versus

BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, SUMTER COUNTY, SOUTH CAROLINA, J. E. MAYES, JR., CHAIRMAN OF SAID BOARD, H. E. KIRVEN, C. W. GOODMAN, W. T. BROGDON, J. ELBERT DAVIS, JR., MEMBERS OF SAID BOARD, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on April, 25, 1956.

OPINIONS BELOW

The opinions, statements and charges of the District Court in denunciation of the decision of the Supreme Court in the Segregation cases, rendered May 17, 1954, *Brown v. Board of Education,* 347 U. S. 483, in refusal of petitioners' motion for judgment to which they are entitled under said decision, are unreported and appear in the record, pages 11-32, under the heading "Transcript of Hearing on Motion for Summary Judgment."

The opinion of the Court of Appeals, printed in Appendix "D" hereto, infra, p. 25, is reported in 232 F. (2d) 626.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1956, infra, p. 26. Jurisdiction of the Court of Appeals was invoked under 28 U. S. C. Section 1291 and Section 1292 (1). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Was not the court below in error in affirming the order of the District Court upon the ground that petitioners were not entitled to the injunctive relief sought for the reason that they had not exhausted supposed administrative remedies provided by recent South Carolina statute?

2. Is not South Carolina statute, Act No. 662, Acts and Joint Resolutions of 1956, apparently intended to be referred to by the court below, violative of the Fourteenth Amendment to the Constitution of the United States and void as part of a legislative plan to evade and defeat the decision of the Supreme Court in the Segregation cases, *Brown v. Board of Education,* 347 U. S. 483, and to maintain segregation in the public schools?

3. Are not the supposed remedies provided by the said South Carolina Act No. 662, Acts and Joint Resolutions of 1956, judicial and not administrative, except in particulars as to which the record shows action by petitioners prior to the passage of the said Act substantially equivalent to exhaustion, and is not the said Act No. 662 considered alone violative of the Fourteenth Amendment?

4. In the circumstances of the case as shown by the record on petitioners' motion for summary judgment—when there was no material issue of fact or semblance of defense save the abortive plea of the provisions of the South Carolina Constitution and statutes held void in the Segregation cases, *Brown v. Board of Education*, and the District Court denounced and repudiated the law as it is declared in the said cases and in denial of the relief to which petitioners were entitled refused the motion—was not the order in refusal in effect a final order and did not the court below err in holding to the contrary?

5. Should not the court below have reversed the District Court and granted the relief sought?

6. In view of the broad implications of the attack upon the Supreme Court involved in the instant case in which rights to which petitioners are indisputably entitled under *Brown v. Board of Education* are denied them in the circumstances and manner shown by the record, is it not of great importance in the public interest generally, as well as in the interest of the large number of people composing the class here directly affected, that the relief sought by petitioners be granted by the Court in reaffirmance of the principle that this is and shall continue to be a country governed by law and that the Supreme Court is the final arbiter in disputes involving rights arising under the Federal Constitution?

STATUTES INVOLVED

The statutes and Interposition Resolution involved are:

Act No. 55, Acts and Joint Resolutions of South Carolina of 1955 (R. 37), printed in Appendix "A" hereto, infra, p. 15.

South Carolina Interposition Resolution, Act of February 14, 1956, Calendar No. S. 514, printed in Appendix "B" hereto, infra, p. 16.

Act No. 662, Acts and Joint Resolutions of South Carolina of 1956 (R. 37), printed in Appendix "C" hereto, infra, p. 21.

STATEMENT

The jurisdiction of the District Court was invoked under 28 U. S. C. Section 1343 (3) because of the deprivation under color of law, statute, regulation, custom and usage of a state of rights, privileges and immunities secured to petitioners by the Fourteenth Amendment to the Constitution of the United States and by the laws thereof, U. S. C. 8, Section 43.

Petitioners and the class represented by them are a group of people of brown skin commonly known as Turks, who live, and whose ancestors lived since shortly after the Revolutionary War, in the northwestern section of Sumter County, South Carolina, in School District No. 2 of said county. According to tradition they descended from the Turkish race and in all public relationships they have been looked upon and treated as white people and they so regard themselves.

The children of the group of elementary and graded school age are required by respondents to attend a segregated elementary and graded school in the said School District known as the Dalzell School, which is provided exclusively for them, where no other children except children

of this group are permitted to be enrolled, and because of their race and color they are refused admission to the white elementary and graded schools of the district, except that a few of the children are permitted to attend two of the smaller white schools known as the Wedgefield School and the Brogdon School (R. 33).

The children of the group of high school age also attend the white high school of the district, known as the Hillcrest High School, by reason of a decree of the United States District Court for the Eastern District of South Carolina rendered on January 8, 1951, in a class action identical with the instant action brought by members of the group on behalf of themselves and all other members similarly situated against the then school trustees in which relief was sought from the exclusion of the children of the group of high school age from the said high school on the ground of race and color, the decree holding that they could not be excluded on such ground and restraining the trustees from denying them admission on such ground.

But notwithstanding the said decree and the fact that the children of the group of high school age are attending the said white high school (R. 33), and although they are permitted to attend the small Wedgefield and Brogdon white elementary and graded schools without objection, they are because of race and color refused by respondents admission to the other and larger white graded and elementary schools of the district.

To redress such discrimination this class action (1) for a declaratory judgment that the action and policy of respondents in so excluding the said children from the said white elementary and graded schools on the ground of race and color is violative of the Fourteenth Amendment to the Constitution of the United States, and (2) for a temporary

and permanent injunction restraining such exclusion on such ground, was commenced on August 31, 1953.

Respondents admitted the exclusion of the said children from the said schools on the ground of race and color and plead in defense and as justification of such action and policy the socalled separate but equal doctrine and provisions of the Constitution and statutes of South Carolina which in *Brown v. Board of Education*, 347 U. S. 483, are expressly held to be null and void (R. 9-11).

On motion by petitioners for summary judgment for the relief sought, interrogatories propounded and answers thereto and affidavits filed merely emphasizing respondents' said admissions, the District Court assailed and denounced the decision of the Supreme Court in *Brown v. Board of Education*, ridiculed and denounced the Court and questioned and impugned its motives in rendering the said decision, charged that the Court made or changed the Constitution of the United States, that it was influenced by the thinking of Socialists and leftwingers, and otherwise excoriated the Court and disparaged and repudiated the said decision in the manner as shown by the record (R. 11-32), and by order made on December 21, 1955, refused the motion.

On appeal the Court of Appeals, holding that the order was not a final order and that the appeal could be entertained only by considering the denial of the motion as denial of the injunctive relief sought, and so considering it, affirmed the order upon the ground that petitioners were not entitled to the injunctive relief sought for the reason that they had not exhausted the administrative remedies provided by a recent South Carolina statute, referred to by the Court as Act No. 55, Acts and Joint Resolutions of South Carolina of 1955, which was grievous error as is shown hereinbelow.

REASONS FOR GRANTING THE WRIT

1. There is presented in the instant case an extraordinary and unprecedented situation correction of which by the Supreme Court is of immeasurable importance from the standpoint of the public interest as it is affected by the proper functioning of the courts and respect for law, and is necessary to prevent the complete annihilation of petitioners' rights here undertaken to be asserted and to which under *Brown v. Board of Education* they are indisputably entitled.

2. The court below was clearly in error in holding and in sustaining the order of the District Court upon the ground that petitioners were not entitled to the injunctive relief sought for the reason that they had not exhausted administrative remedies provided by recent South Carolina statute.

Reference to the South Carolina statute referred to by the Court, Act No. 55, Acts and Joint Resolutions of 1955, (R. 37), Appendix "A" hereto, infra, p. 66, shows that this Act does not provide administrative remedies whatsoever or purport to do so. Petitioners could, therefore, hardly have failed to exhaust such remedies under the Act of 1955, as the Court held they did, when it provides none.

It seems evident that the Court had in mind Act No. 662, Acts and Joint Resolutions of South Carolina of 1956, approved March 8, 1956, Appendix "C" hereto, infra, p. 21, but gained the erroneous impression that this Act was passed in 1955, and mistakenly referred to it as Act No. 55 of the Acts and Joint Resolutions of 1955. Attention is called to the manner in which the two Acts were printed by respondents in the record (R. 37-40)—Act No. 55 being numbered and bearing the heading "Act No. 55, Acts and Joint Resolutions of South Carolina of 1955", and the beginning of Act No. 662 of 1956 commencing on the same

page immediately following Act No. 55 and not being numbered and bearing no similar heading, which it would seem probably explains the Court's mistaken reference, but does not explain or correct the Court's finding or its affirmance of the order.

The order of the District Court was rendered on December 21, 1955, as has been seen (R. 33). It is obviously impossible that petitioners could have failed to exhaust the supposed administrative remedies provided by the Act of 1956 and that such failure could have been reason for sustaining the order when the Act was not in existence when the order was rendered. There is, therefore, no basis whatsoever for the holding that petitioners were not entitled to the injunctive relief sought or for affirmance of the order.

3. The record shows that Act No. 662, Acts and Joint Resolutions of South Carolina of 1956 was injected into the instant case for the first time by way of argument on the appeal from the order of the District Court. The action having been commenced, jurisdiction having been properly invoked and the court having taken jurisdiction, on August 31, 1953, the case having proceeded to the point of motion for judgment by petitioners and the order of the District Court thereon having been rendered on December 21, 1955, and the appeal therefrom having been taken, and the said Act No. 662 not having been passed until March 8, 1956, during the pendency of the appeal, the instant case could not be affected or retarded in the slightest way by the said Act No. 662, even if it were valid. *Freeman v. Howe*, 65 U. S. 450, 24 How. 450, 16 L. Ed. 749; *Peck v. Jenness*, 48 U. S. 612, 12 L. Ed. 841; *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F. (2d) 57.

4. The said Act No. 662, Acts and Joint Resolutions of South Carolina of 1956, is shown to be part of a legislative plan to evade and defeat the decision of the Supreme Court

in the Segregation cases, *Brown v. Board of Education,* and to retain segregation in the public schools, and is violative of the Fourteenth Amendment and void:

(a) Following the decision in *Brown v. Board of Education* rendered on May 17, 1954, South Carolina Act No. 55, Acts and Joint Resolutions of 1955 was passed giving school trustees power, among other things, to operate or not operate any public schools of their districts, to transfer any pupil from one school to another and to determine the school within the district in which any pupil shall enroll, Appendix "A" hereto, infra, p. 15.

(b) On February 14, 1956, the socalled South Carolina Interposition Resolution (Appendix "B" hereto, infra, p. 16) was passed, a copy of which was directed to be sent to the Supreme Court, condemning the decision in *Brown v. Board of Education* and in effect declaring the intention and purpose to continue to maintain segregation in the public schools.

(c) On March 8, 1956, said Act No. 662 was passed, implementing Act No. 55 of 1955 and the said Interposition Resolution. Reference to said Act No. 662, Appendix "C" hereto, *infra*, p. 21, shows that it imposes onerous burdens and requirements difficult, if not impossible, to comply with in the case of the average child who may be aggrieved, among which is the requirement that the case of each child shall be heard and disposed of separately, which obviously, if the requirement could be complied with, could but result in multitudinous useless, expensive, separate hearings and appeals before boards and courts acting under provisions of the Constitution and statutes of South Carolina which prohibit the mixing of races in the public schools, and which are still claimed to be of force notwithstanding the decision in *Brown v. Board of Education*, as is shown by the said Interposition Resolution. It would seem that, if permitted

to stand, a more effective scheme for defeating rights such as are undertaken to be asserted here could scarcely be devised. Clearly the said Act No. 662 is void as violative of the Fourteenth Amendment. *Lane v. Wilson*, 307 U. S. 268, 83 L. Ed. 1281; *Bush v. Orleans Parish School Board*, 138 F. Supp. 336.

5. The rule as to exhaustion of administrative remedies provided by state law before resort can be had to federal courts obviously has not the slightest application in the instant case where the right undertaken to be asserted under federal law is denied by state law, which though declared void by the Supreme Court is still claimed by the state to be of force, and the supposed administrative remedy is not, in fact, a remedy at all, but is shown to be a contrivance designed to defeat the right undertaken to be asserted.

6. The alleged remedies provided by the said South Carolina Act No. 662 of 1956 are judicial, and not administrative, except as to the requirement of appeal from Boards of Trustees to County Boards of Education, and the answer of respondents (R. 9-10) shows that in the instant case there was action by petitioners and by the County Board of Education, prior to the commencement of the instant case, substantially fulfilling the said requirement.

It is not necessary to exhaust judicial remedies provided by state law before resorting to federal courts. *Lane v. Wilson*, 307 U. S. 268, 83 L. Ed. 1281.

7. The court below had before it the entire record in the case showing that there is no manner of defense to the action, no issue of fact for determination, and nothing to be tried or done as prerequisite to the granting of the relief sought and the Court should have finally disposed of the case by appropriate decree.

8. In the circumstances here shown the order refusing summary judgment was in effect a final order and appealable as such and the court below erred in holding to the contrary. *Baltimore & O. R. Co. v. United Fuel Gas Co.*, 154 F. (2d) 545; *The Attualita*, 238 F. 909; *Odell v. H. Batterman Co.*, 223 F. 292; *Sanders v. Bluefield Waterworks & Improvement Co.*, 106 F. 587; *W. J. Dillner Transfer Co. v. U. S.*, 101 F. Supp. 506, affirmed 344 U. S. 883.

9. In rendering the decision herein which it did render and in holding that petitioners were not entitled to the injunctive relief sought, the court below decided federal questions in a way in conflict with applicable decisions of the Supreme Court. *Lane v. Wilson*, 307 U. S. 268, 83 L. Ed. 1281, and others.

10. The facts and circumstances involved here show open and flagrant defiance of law and pose an attack upon the federal judicial system, and it is believed that in not reversing the District Court and in not affirmatively expressing disapproval of and overruling the opinions, rulings, statements and charges made by the District Court, and thus repulsing such attack, the Court of Appeals tacitly sanctioned, or its action was in effect equivalent to sanctioning, such a grave departure from the accepted and usual course of judicial proceedings by the District Court as in the public interest, as well as in the interest of the petitioners, to call for an exercise of the Supreme Court's power of supervision, and for the granting by the Supreme Court of the relief here sought.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

AUGUSTUS S. MERRIMON,

Counsel for Petitioners.

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APPENDIX "A"

ACT NO. 55, ACTS AND JOINT RESOLUTIONS OF SOUTH CAROLINA OF 1955

An Act To Amend Section 21-230, Code of Laws of South Carolina, 1952, Relating To The General Powers And Duties of School Trustees, So As To Further Provide Therefor; And To Add A New Section To The Code, Designated As Section 21-230.1, Providing That Where The County Educational System Operates As A Unit, The County Board Of Education Or The Educational Governing Body Of The County Shall Have All The Powers And Duties Of School Trustees.

Be it enacted by the General Assembly of the State of South Carolina:

Section 21-230, (6) 1952 Code, amended—delete word "free" from words "free public schools":

SECTION 1. Subsection (6), Section 21-230, Code of Laws of South Carolina, 1952, is amended by deleting the word "free" in the first line so that when so amended Subsection (6) shall read as follows:

"(6) Visit the public schools within its district from time to time and at least once in every school term and take care that they are conducted according to law and with the utmost efficiency;".

Section 21-230, (7), 1952 Code, amended—trustees to decide whether or not to operate public schools:

SECTION 2. Subsection (7), Section 21-230, Code of Laws of South Carolina, 1952, is amended by striking out the entire subsection and inserting in lieu thereof the following:

"(7) Manage and control local educational interests of its district, with the exclusive authority to operate or not operate any public school or schools;".

Section 21-230, 1950 Code, amended—Subsection (9) added—trustees transfer pupils—determine which schools pupils to enroll in:

SECTION 3. Section 21-230, Code of Laws of South Carolina, 1952, is amended by adding after Subsection (8) the following, which shall be known as Subsection (9):

"(9) Transfer any pupil from one school to another so as to promote the best interests of education and to determine the school within its district in dhich any pupil shall enroll."

Code of 1952 amended—Section 21-230.1 added—when governing body of schools to assume powers and duties of trustees:

SECTION 4. The code of Laws of South Carolina, 1952, is amended by adding thereto the following new section, to be known as Section 21-230.1:

"Section 21-230.1. Where the county educational system operates as a unit, the county board of education or the educational governing body of the county shall have all the powers and duties of school trustees."

Repeal:

SECTION 5. All acts or parts of acts inconsistent herewith are hereby repealed.

Time effective:

SECTION 6. This act shall take effect upon its approval by the Governor.

Approved the 9th day of March, 1955.

APPENDIX "B"

SOUTH CAROLINA INTERPOSITION RESOLUTION ACT OF FEBRUARY 14, 1956, CALENDAR NO. S. 514

A Joint Resolution Condemning And Protesting The Usurpation And Encroachment On The Reserved Powers Of The States By The Supreme Court Of The United States, Calling Upon The States And Congress To Prevent This And Other Encroachment By The Central Government And Declaring The Intention Of South Carolina To Exercise All Powers Reserved To It, To Protect Its Sovereignty And The Rights Of Its People.

Mindful of its responsibilities to its own citizens and of its obligations to the other States, the General Assembly of South Carolina adopts this Resolution in condemnation of and protest against the illegal encroachment by the central government into the reserved powers of the States and the rights of the people, and against the gave threat to

constitutional government, implicit in the recent decisions of the Supreme Court of the United States, for these reasons:

1. The genius of the American Constitution lies in two provisions. It establishes a clear division between the powers delegated by the States to the central government and the powers reserved to the States, or to the people. As a prerequisite to any lawful redistribution of these powers, it establishes as a part of the process for its amendment the requirement of approval by the States.

The division of these powers is reaffirmed in the Tenth Amendment to the Constitution in these words: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Long judicial precedent also clearly reaffirms that the central government is one of delegated powers, specifically enumerated in the Constitution, and that all other powers of government, not prohibited by the Constitution to the States, are reserved to the States or to the people.

The power to propose changes and the power to approve changes in the basic law is specifically stated by Article V of the Constitution in these words: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . ."

Lincoln, in his first inaugural, recognized these constitutional principles in the following language: "The maintenance inviolate to the rights of the States, and especially the right of each State to order and control its own domestic institutions, according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend . . ."

2. Neither the judicial power delegated to the Supreme Court in Article III of the Constitution nor such appellate jurisdiction as the Article authorizes the Congress to confer upon the Court, makes the Court the Supreme Arbiter of the rights of the States under the compact.

3. The right of each of the States to maintain at its own expense racially separate public schools for the children of its citizens and other racially separate public facilities is not forbidden or limited by the language or the intent of the Fourteenth Amendment. This meaning of the Fourteenth Amendment was established beyond reasonable question by the action of the Congress in providing for racially segregated schools in the District of Columbia by legislation contemporaneous with the submission of the Fourteenth Amendment to the States in 1866, and by the fact that a majority of the States in the Union at that time recognized that segregation in public facilities had not been abolished by this Amendment. There is no evidence in the Constitution, in the Amendments, or in any contemporary document that the States intended to give to the central government the right to invade the sanctity of the homes of America and deny to responsible parents a meaningful voice in the training of their children or in the selection of associates for them.

4. For almost sixty years, beginning in 1896, an unbroken line of decisions of the Court interpreted the Fourteenth Amendment as recognizing the right of the States to maintain racially separate public facilities for their people. If the Court in the interpretation of the Constitution is to depart from the sanctity of past decisions and to rely on the current political and social philosophy of its members to unsettle the great constitutional principles so clearly established, the rights of individuals are not secure and government under a written Constitution has no stability.

5. Disregarding the plain language of the Fourteenth Amendment, ignoring the conclusive character of the contemporary actions of the Congress and of the State legislatures, overruling its own decisions to the contrary, the Supreme Court of the United States on May 17, 1954, relying on its own views of sociology and psychology, for the

first time held that the Fourteenth Amendment prohibited the States from maintaining racially separate public schools and since then the Court has enlarged this to include other public facilities. In so doing the Court, under the guise of interpretation, amended the Constitution of the United States, thus usurping the power of Congress to submit, and that of the several States to approve, constitutional changes. This action of the Court ignored the principle that the meaning of the Constitution and of its Amendments does not change. It is a written instrument. That which the Fourteenth Amendment meant when adopted it means now (*South Carolina v. United States*, 199 U. S. 437, 449).

6. The educational opportunities of white and colored children in the public schools of South Carolina have been substantially improved during recent years and highly satisfactory results are being obtained in our segregated schools. If enforced, the decision of the Court will seriously impair and retard the education of the children of both races, will nullify these recent advances and will cause untold friction between the races.

7. Tragic as are the consequences of this decision to the education of the children of both races in the Southern States, the usurpation of constitutional power by the Court transcends the problems of segregation in education. The Court holds that regardless of the meaning of a constitutional provision when adopted, and in the language of the 1955 Report of the Gray Commission to the Governor of Virginia, "irrespective of precedent, long acquiesced in, the Court can and will change its interpretation of the Constitution at its pleasure, disregarding the orderly processes for its Amendment set forth in Article V thereof. It means that the most fundamental of the Rights of the States or of their citizens exist by the Court's sufferance and that the law of the land is whatever the Court may determine it to be * * *" Thus the Supreme Court, created to preserve the Constitution, has planted the seed for the destruction of constitutional government.

8. Because the preservation of the rights of the States is as much within the design and care of the Constitution as the preservation of the national government, since "the

Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States" (*Texas v. White* (1869), 7 Wallace 700, 725), and since the usurpation of the rights reserved to the States is by the judicial branch of the central government, the issues raised by this decision are of such grave import as to require this sovereign State to judge for itself of the infraction of the Constitution.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. That the States have never delegated to the central government the power to change the Constitution nor have they surrendered to the central government the power to prohibit to the States the right to maintain racially separate but equal public facilities or the right to determine when such facilities are in the best interest of their citizens.

SECTION 2. That the action of the Supreme ourt of the United States constitutes a deliberate, palpable, and dangerous attempt to change the true intent and meaning of the Constitution. It is in derogation of the power of Congress to propose, and that of the States to approve, constitutional changes. It thereby establishes a judicial precedent, if allowed to stand, for the ultimate destruction of constitutional government.

SECTION 3. That the State of South Carolina condemns and protests against the illegal encroachment by the central government into the reserved powers of the States and the rights of the people and against the grave threat to constitutional government implicit in the decisions of the Supreme Court of the United States.

SECTION 4. That the States and the Congress do take appropriate legal steps to prevent, now and in the future, usurpation of power by the Supreme Court and other encroachment by the central government into the reserved powers of the States and the rights of the people to the end that our American system of Constitutional government may be preserved.

SECTION 5. In the meantime, the State of South Carolina as a loyal and sovereign State of the Union will

exercise the powers reserved to it under the Constitution to judge for itself of the infractions and to take such other legal measures as it may deem appropriate to protect its sovereignty and the rights of its people.

SECTION 6. That a copy of this Resolution be sent to the Governor and Legislature of each of the other States, to the President of the United States, to each of the Houses of Congress, to South Carolina's Representatives and Senators in the Congress, and to the Supreme Court of the United States for its information.

SECTION 7. This act shall take effect upon its approval by the Governor.

In the Senate House the 14th day of February.

In the Year of Our Lord One Thousand Nine Hundred and Fifty-six.

ERNEST F. HOLLINGS,
President of the Senate.

SOLOMON BLATT,
Speaker of the House of Representatives.

Approved the 14th day of February, 1956.

GEORGE BELL TIMMERMAN, JR.,
Governor.

APPENDIX "C"

ACT NO. 662, ACTS AND JOINT RESOLUTIONS OF SOUTH CAROLINA OF 1956

An Act To Amend Section 21-103 Of The Code Of Laws Of South Carolina, 1952, Relating To The Determination Of Local Controversies And Appeals From County Boards Of Education, So As To Provide For Appeals From Decisions Of Boards Of Trustees To County Boards Of Education And Appeals From County Boards Of Education To The Courts, And To Amend Section 21-46 Of The Code Of Laws Of South Carolina, 1952, Relating To The Powers And Duties Of The State Board Of Education So As To Eliminate Therefrom All Reference To Appeals From County Boards Of Education.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 21-103 of the Code of Laws of South Carolina, 1952, is hereby amended by striking the entire Section and substituting in lieu thereof the following:

"Section 21-103 (1). Subject to the provisions of Section 21-230, as amended, any parent or person standing *in loco parentis* to any child of school age, the representatives of any school or any person aggrieved by any decision of the Board of Trustees of any school district in any matter of local controversy in reference to the construction or administration of the school laws or the placement of any pupil in any school within the district, shall have the right to appeal the matter in controversy to the County Board of Education by serving a written petition upon the Chairman of the Board of Trustees, the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which a copy of the order or directive of the Board of Trustees was delivered to him by mail or otherwise. The petition shall be verified and shall include a statement of the facts and issues involved in the matter in controversy. The parties shall be entitled to a prompt and fair hearing by the board which shall try the matter *de novo* and in accordance with its rules and regulations. Where individual children of school age are involved in the matter of controversy, the case of each child shall be heard and disposed of separately.

"Section 21-103 (2). After the parties have been heard, the County Board of Education shall issue a written order disposing of the matter in controversy, a copy of which shall be mailed to each of the parties at interest and any party aggrieved thereby shall have the right to appeal to the Court of Common Pleas of the County by serving a written verified petition upon the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which copy of the order of the County Board of Education was mailed to the petitioner. The parties so served shall have twenty (20) days from the date of service, exclusive of the date of service, within which to make return to the petition or to otherwise plead, and the matter in controversy shall be tried by the circuit judge, *de novo*, with or without reference to a master or special

referee; provided, that the County Board of Education shall certify to the court the record of the proceedings upon which its order was based, and the record so certified shall be admitted as evidence and considered by the court, along with such additional evidence as the parties may desire to present. The courts shall consider and dispose of the cause as other equity cases are tried and disposed of, and all parties at interest shall have such rights and remedies, including the right of appeal, as are now provided by law in such cases.

"Section 21-103 (3). In counties where the functions of the Boards of Trustees and those of the County Board of Education have been combined, the appeal provided in Section 21-103 (1) shall lie to the County Board of Education from its original action disposing of the matter in controversy before hearing.

"Section 21-103 (4). At any hearing provided for in Section 21-103 (1), the parties may appear in person or through an attorney licensed to practice in South Carolina and may submit such testimony, under oath, or other evidence as may be pertinent to the matter in controversy.

"Section 21-103 (5). The County Board of Education may designate one of its members to conduct any hearing provided for in Section 21-103 (1) and report the matter to the board for determination.

"Section 21-103 (6). Until the matter in controversy has been finally disposed of, no appeal shall act as a *supersedeas* or suspension of the order of the board having original jurisdiction of the cause."

SECTION 2. Amend Section 21-46 of the Code of Laws of South Carolina, 1952, by striking therefrom the last two sentences so that said section shall, when amended, provide as follows:

"The State Board of Education shall constitute an advisory body with whom the State Superintendent of Education shall have the right to consult when he is in doubt as to his official duty."

SECTION 3. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such

provision to other persons or circumstances shall not be affected thereby.

SECTION 4. All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 5. This Act shall take effect upon its approval by the Governor.

In the Senate House the 6th day of March.

In the Year of Our Lord One Thousand Nine Hundred and Fifty-six.

ERNEST F. HOLLINGS,
President of the Senate.

SOLOMON BLATT,
Speaker of the House of Representatives.

Approved the 8th day of March, 1956.

GEORGE BELL TIMMERMAN, JR.,
Governor.

APPENDIX D

OPINIONS AND JUDGMENTS BELOW

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7163

WOODROW W. HOOD, PEGGY ANN HOOD, LEVER RAY, IRMA RAY, HENRY LOWREY, and RUTH LOWREY, Appellants,

versus

BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, Sumter County, South Carolina, J. E. MAYES, JR., Chairman of Said Board, H. E. KIRVEN, C. W. GOODMAN, W. T. BROGDON, J. ELBERT DAVIS, JR., Members of Said Board, Appellees.

Appeal from the United States District Court for the Eastern District of South Carolina at Columbia

(Argued April 24, 1956. Decided April 25, 1956.)

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

A. S. Merrimon for Appellants, and John S. Wilson (Shepard K. Nash and L. E. Purdy on brief) for Appellees.

PER CURIAM:

This is an appeal from the denial of a motion for summary judgment in an action by school children for an injunction to prevent discrimination on the ground of race. As the denial of motion for summary judgment is not a final judgment in the case, we can entertain the appeal only by considering the denial of the motion as a denial of in-

junctive relief. So considered, the order denying such relief must be affirmed, as the administrative remedies prescribed by the recent South Carolina Statute * have not been exhausted. *Carson v. Board of Education of McDowell County*, 4 Cir. 227 F. (2d) 789. As plaintiffs were not entitled to injunctive relief for this reason, we affirm the order in so far as it denies an injunction, without passing upon other questions raised in the case or approving the reasoning of the court below in denying the motion for summary judgment.

Affirmed.

JUDGMENT

(Title omitted)

Appeal from the United States District Court for the Eastern District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

April 25, 1956.
Filed,
April 25, 1956.

R. M. F. WILLIAMS, JR.,
Clerk.

The opinions, statements and charges of the District Court are printed in the record, pages 11-32, under the heading "Transcript Of Hearing On Motion For Summary Judgment."

The order of the District Court is printed in the record, page 33.

* Act No. 55, Acts and Joint Resolutions of South Carolina of 1955.

No. 248

JUL 12 1955

JOHN T. FEY, Clerk

BRIEF AND APPENDIX FOR APPELLANTS

United States Court of Appeals

FOURTH CIRCUIT

No. 7163

WOODROW W. HOOD, PEGGY ANN HOOD, LEVER RAY, IRMA RAY, HENRY LOWREY, AND RUTH LOWREY, APPELLANTS,

versus

BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, SUMTER COUNTY, SOUTH CAROLINA, J. E. MAYES, JR., CHAIRMAN OF SAID BOARD, H. E. KIRVEN, C. W. GOODMAN, W. T. BROGDON, J. ELBERT DAVIS, JR., MEMBERS OF SAID BOARD, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

A. S. MERRIMON,
Sumter, S. C.,
Attorney for Appellants.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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BRIEF AND APPENDIX FOR APPELLANTS

United States Court of Appeals

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WOODROW W. HOOD, PEGGY ANN HOOD, LEVER RAY, IRMA RAY, HENRY LOWREY, AND RUTH LOWREY, APPELLANTS,

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BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, SUMTER COUNTY, SOUTH CAROLINA, J. E. MAYES, JR., CHAIRMAN OF SAID BOARD, H. E. KIRVEN, C. W. GOODMAN, W. T. BROGDON, J. ELBERT DAVIS, JR., MEMBERS OF SAID BOARD, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

QUESTION INVOLVED

Should the Order of the District Court be reversed and the relief sought by appellants be granted because of the refusal of the District Judge to recognize as the law and as binding upon him the controlling decision of the

Supreme Court, because of his denunciation of said decision and his refusal to apply it in denial of the relief sought, when the record conclusively showed that appellants are entitled to the relief sought under the law as it is declared by the said decision of the Supreme Court?

STATEMENT OF CASE

This class action for (1) a declaratory judgment that the policy of appellees in refusing admission of the children of appellants and of all other members of the group or class represented by them similarly situated as students in the white elementary and grammar schools of School District No. 2 of Sumter County, South Carolina, solely on the basis of race and color is violative of the Fourteenth Amendment to the Constitution of the United States, and (2) for a temporary and a permanent injunction restraining appellees from denying the said children, possessing proper qualifications, admission to the said schools solely because of their race or color, was commenced on August 31, 1953.

Appellees admitted the exclusion of the said children from the said schools on the basis of race and color and plead in defense and as justification of such action and policy the socalled separate but equal doctrine and provisions of the Constitution and statutes of the State of South Carolina which in *Brown v. Board of Education of Topeka, Shawnee County, Kan., etc.*, 74 S. Ct. 666, 347 U. S. 483, filed May 17, 1954, are expressly held to be null and void. The answer thus stating no defense, and answers to interrogatories propounded and affidavits filed confirming and emphasizing the admissions contained in the answer, and the entire record showing that the said children are refused admission to the said schools because of race and color and upon no other grounds, and that there is no issue whatsoever as to any material fact in the case, ap-

pellants moved the Court for summary judgment for the relief demanded.

The motion was heard by District Judge George Bell Timmerman, at Columbia, on December 19, 1955. On hearing the motion the District Judge assailed and denounced the said recent decision of the Supreme Court, ridiculed the Court and questioned and impugned its motives in rendering the said decision and refused to recognize it as the law and as of binding force and effect and refused to apply it, in denial of appellants' rights and of the relief they seek and to which under the law as it is declared by the said decision they are entitled, and on December 21, 1955, passed his Order refusing the motion. The appeal is from this Order.

STATEMENT OF FACTS

Appellants and the class represented by them are a group of people who live, and whose ancestors lived since shortly after the Revolutionary War, in the northwestern section of Sumter County, South Carolina, in School District No. 2 of said County. They are of light brown complexion and are commonly known as "Turks." According to tradition, accepted by them and by people generally, they descended from the Turkish race, and in all public relationships they have been looked upon and treated as white people and they so regard themselves. Throughout the years they have registered and voted as white persons, their people were enlisted in the War between the States and in World Wars I and II as white persons, a number of their group have married white persons, they have white preachers for their churches and their children have been regularly admitted to the white elementary and high schools of other counties of South Carolina and to the colleges of South Carolina and other states. They are admittedly not Negroes, are not regarded as Negroes, and have always held themselves aloof from Negroes.

The children of these people of elementary and graded school age are required to attend a segregated elementary and graded school in said School District known as the Dalzell School which is provided exclusively for them, where no other children except children of this group are permitted to be enrolled, and because of their race and color they are refused admission to the white elementary and graded schools of the district, except that, strange as it may seem, a few of the children are permitted to attend two of the smaller white schools of the district, known as the Wedgefield School and the Brogdon School. Five of the children of the group are enrolled at the Wedgefield School, and one at the Brogdon School, in each instance with the consent and by the voluntary action of the school authorities.

The children of the group of high school age also attend what is known as the Hillcrest High School in the said school district by reason of a decree of the United States District Court for the Eastern District of South Carolina rendered on January 8, 1951, in a class action identical with the instant action brought by members of the group against the school trustees in which relief was sought from the exclusion of the children of the group of high school age from the said high school on the ground of race and color, the decree holding that they could not be excluded on such ground and restraining the trustees from denying them admission.

But notwithstanding the said decree and the fact the children of the group are attending the said white high school and although they are permitted to attend the Wedgefield and Brogdon white elementary and graded schools without objection, they are, because of race and color refused admission to the other white graded and elementary schools of the district.

Some time prior to July 31, 1953, after application had been made for the admission of the children of the group to the white elementary and graded schools of the district which they were not permitted to attend, the school trustees advised the appellant group, through their attorneys, that the Dalzell School, in which the children of the group of graded school age are segregated, would be abolished and that the children would be admitted to the graded schools to which they seek admission, but thereafter, in the month of August, 1953, the group were advised by the trustees that the children would not be admitted to the said schools and that the "Dalzell Grammar School for Turks" would be operated as theretofore. This action was thereupon commenced.

ARGUMENT

Should the Order of the District Court be reversed and the relief sought by appellants be granted because of the refusal of the District Judge to recognize as the law and as binding upon him the controlling decision of the Supreme Court, because of his denunciation of said decision and his refusal to apply it in denial of the relief sought, when the record conclusively showed that appellants are entitled to the relief sought under the law as it is declared by the said decision of the Supreme Court?

The entire record in the case—the pleadings, the answers to the interrogatories, the affidavits filed—conclusively shows that appellants' children are refused admission to the schools in question solely because of their race and color, and that under *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 74 S. Ct. 666, 347 U. S. 483, appellants are entitled to the relief sought. Appellants' entire case is admitted in the answer of appellees in words as clear as language can make them. The answers to the interrogatories and the affidavits filed confirm and empha-

size the admissions and no one single syllable can be found in the record which shows otherwise than that there is a complete absence of any material issue of fact whatsoever in the case, and appellants' right to the relief demanded is so clearly and firmly established as to preclude argument to the contrary. And yet, appellees still undertake to defend upon the dead doctrine of equal but separate facilities enunciated in *Plessy v. Ferguson*, 163 U. S. 527, 16 S. Ct. 1138, and upon the equally dead provisions of the Constitution and statutes of South Carolina set up in their answer, in face of the late decision in the *Brown case*, and they defend upon no other ground.

The facts of the case are settled beyond peradventure of doubt. The law making appellants secure in the right claimed is settled beyond cavil. In this situation there is presented a state of affairs incredible and unprecedented, where the District Judge, in denial of the relief to which appellants are justly entitled, assails and denounces the law as it is declared by the highest Court of the land, refuses to apply it, and mocks and ridicules and abuses the Court and questions and impugns its motives in rendering the decision referred to, charges that the Court made or changed the Constitution of the United States, that it was influenced by concepts which are at variance with the principles upon which this country was founded, and otherwise excoriates the Court and disparages its decision in the manner as shown by the record. We do not undertake to quote his extended remarks and charges here. It is unnecessary. They appear in the transcript of the hearing had before him. The transcript is in the record and it is printed in full in the appendix to this brief. We ask the Court to read it.

We have searched the books, we think fairly diligently, and we do not find that ever before in the judicial history of this country has a Judge of a District Court, or of any

court, so assailed the Supreme Court and arrayed himself against it and denounced and refused to recognize the binding force of a decision rendered by it, as did the District Judge in this case. There is nothing that approaches it in the annals of the law.

We can conceive of nothing more demoralizing and detrimental to the administration of justice and the proper functioning of the courts. Such an attitude and utterances from the bench of a District Court, in open defiance of the Supreme Court, can, in our opinion, but be calculated to create disrespect for law and for the courts in general, result in incalculable instances of injustice such as is shown to have occurred in the instant case, and if such a practice should become general and continue, could it do otherwise than ultimately result in a chaotic condition disruptive and destructive of the entire judicial system of the country, State and Federal? And what would that mean? The answer is found in the history of oppressed peoples of every nation of the earth that has or has had government by men.

As to the action of appellees in refusing to admit appellants' children to the larger and better white graded schools, to all of them except two small inferior ones, while admitting the children to the two small schools, and when the children are and since 1951 have been attending the white high school, we merely ask where could an instance paralleling such inconsistency and arbitrary and unjust and humiliating discrimination be found?

It will be observed from the record that on August 31, 1953, District Judge Ashton H. Williams made a temporary restraining order restraining appellees from refusing to admit the children to the various white schools of the district and from requiring them to attend the Dalzell School (the Dalzell School, as has been seen, being the graded school in which most of the children are segregated), and that on September 2, 1953, Judge Williams

made an order modifying his order of August 31, 1953, by eliminating its mandatory provisions. We ask the Court to read both of these orders.

It will be noted from the last-mentioned order that it was made upon appellees' representations, made by affidavit of Hugh T. Stoddard, superintendent of the school district, which we also ask the Court to read, that time was needed within which to transfer the pupils from the one school to the others, to assign them to classes, reroute the school buses, etc.

It will also be seen from answers made by the Superintendent to interrogatories propounded by appellants that there are only 61 children of the appellant group in the Dalzell segregated school. How long should it take to make the obviously simple arrangements necessary to the admission of these comparatively few children to the other schools, some of which are shown by the superintendent's answers to be large schools with hundreds of pupils? Has there been reasonable time? In the circumstances shown here is not two years and a half much more than reasonable time? The record shows that there is no just excuse whatsoever for further delay in admitting these children to these schools.

Every fact, incident and circumstance touching this matter strengthens the perfectly obvious right undertaken to be asserted here and shows most arbitrary and unlawful denial of it. Undeniably entitled to the right claimed, do these appellants stand in the presence of the law helpless to achieve it because of the personal views and feelings of the District Judge who repudiates and denounces the law of the case when it is his bounden duty to declare and apply the law?

There is and can be no room for argument in this case. The question of transcending importance involved here,

presented with all possible force and made crystal clear, is whether the law of the land is supreme or whether it is to be made a farce and laughingstock. There can be but the one answer. Our complete confidence that the challenge laid down will be met and that the answer will be found in the decision of this Court in this case explains this appeal.

CONCLUSION

We may say in conclusion that we are fully aware of the opposition in segments of the country to the admission of Negroes to the white public schools. The instant case is no part or parcel of that controversy. As has been seen, the group to which appellants belong are admittedly not members of the Negro race.

We submit that simple right and justice demand that the Order of the District Court should be reversed and that by a proper mandate of this Court appellants should be accorded the relief sought. The prestige of the Courts, in our opinion, demands it. The public interest as it is affected by respect for law, in our opinion, demands it.

Respectfully submitted,

A. S. MERRIMON,
Sumter, S. C.,
Attorney for Appellants.

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AMENDED COMPLAINT

To the Honorable Judge of the District Court of the United States for the Eastern District of South Carolina, Columbia Division:

Now come the Plaintiffs, Woodrow W. Hood, and Peggy Ann Hood, who are husband and wife, Lever Ray and Irma Ray, who are husband and wife, and Henry Lowrey and Ruth Lowrey, who are husband and wife, who are residents and tax payers within the Sumter County School District No. 2, of Sumter County, South Carolina, and who have children of graded school age and qualifications necessary for admission to graded school, and respectfully show that:

I

The jurisdiction of this court is invoked under subdivision 3 of Section 1343 of Title 28 of the United States Code, this being an action authorized by law to be brought to redress the deprivation under color of law, statute, regulation, custom and usage of a state of rights, privileges and immunities secured by the Constitution of the United States, namely, the Fourteenth Amendment of said Constitution and of rights secured by the laws of the United States, namely, Section 43 of Title 8 of the United States Code, all of which will appear more fully hereafter.

II

Plaintiffs further show that this is a proceeding for a declaratory judgment under Sections 2201 and 2202 of Title 28 of the United States Code for the purpose of determining an actual controversy between the parties, to wit: whether the practice of the Defendants in enforcing the policy, custom and usage by which the children of Plaintiffs and the children of other members of the group to which plaintiffs belong, similarly situated, are denied admission to the various schools for white children located in said Sumter County School District No. 2, and are required to attend the Dalzell School where only Turks are enrolled, on the basis of race color or arbitrary abuse of discretion, violates rights secured under the Fourteenth Amendment of the Federal Constitution.

III

This is a class action authorized by Rule 23 (a) of the Rules of Civil Procedure for the District Courts of the United States. The rights involved are of common and general interest to the class represented by the plaintiffs, namely, citizens of the United States and of the State of South Carolina who are members of a group, commonly known as "Turks," being of the Caucasian race, whose ancestors have lived in this approximate community since shortly after the revolutionary war, and who are now the parents of children who possess all the qualifications for admission to graded school. Members of this class are so numerous as to make it impracticable to bring all of them before the Court, and for this reason plaintiffs prosecute this action in their own behalf and in behalf of the class, without specifically naming the said members therein.

IV

That by virtue of the Statutes of South Carolina, the plaintiffs are the natural guardians of their minor children, and have the right to maintain this action, (Title 31, Section 51, Code of Laws of South Carolina, 1952), their children being qualified for admission to the grammar schools of Sumter County School, District No. 2.

V

That by virtue of the Statutes of South Carolina, and for the purpose of providing free instruction and training children of school age presiding in said State, a system of Graded Public Schools, supported by the public funds of the State, has been established as bodies politic and corporate, with Boards of Trustees, constituting the governing body of such school districts subject to the supervision and orders of the County Board of Education, as provided in Title 21, Section 22, of the Code of Laws of South Carolina, 1952, and by virtue of said laws, Sumter County School District No. 2 has been created in Sumter County, said State, with a Broad of Trustees, and the Defendant, J. E. Mayes, Jr., is the Chairman of said Board, and the Defendants, H. E. Kirven, C. W. Goodman, W. T. Brogdon and J. Elbert

Davis, Jr., are the members of said Board, and these Defendants are sued in their representative capacity.

VI

That the members of the group or class to which the plaintiffs belong have for many years been looked upon and treated, in all public relationships, as white persons, which plaintiffs allege they are. Their people were enlisted in the War Between the States as white persons, and likewise, in World Wars I and II. They have always registered and voted as white persons, in white democratic elections; have always had white preachers for their churches; have been admitted as students to the white colleges of this and other States. A number of their group have married white persons in Sumter and other counties of this State, and the children of these marriages have been regularly admitted to the white graded schools and high schools in other counties in the State, and some members of this group have been admitted to the Wedgefield Schools, in Sumter County, South Carolina, which are in said School District No. 2, and have been admitted to other white schools in the City and County of Sumter.

VII

That in the case of *Herbert Ray et al. v. The Board of Trustees of Hillcrest High School, etc., et al.*, the same being a proceeding brought in this Court, and designated as Civil Action No. 2627, the plaintiffs in that case, who represented the same class as do the plaintiffs in this case, were ordered, by the Honorable George Bell Timmerman, U. S. District Judge, by his Order dated January 8th, 1951, to be admitted to the Hillcrest High School; and that the Hillcrest High School is in the same District as are the graded and elementary schools to which the plaintiffs now seek admission for their children. That the present defendants are the successors as a governing body of said school area, and the defendants are therefore barred and estopped, by said Decree dated January 8th, 1951, from denying to the children of the class represented by the plaintiffs admission to said schools, and that the question now pre-

sented to this Honorable Court is *res judicata* by reason of such Decree of the Honorable George Bell Timmerman.

VIII

That the plaintiffs and other residents of said school district belonging to this group now have children of elementary and grammar school age and qualifications, and they have applied to the Board of Trustees of Sumter County School District No. 2 for admission of said children into the white schools of said District, and for their enrollment therein as students. That some time prior to July 31st, 1953, said Board of Trustees of said School District No. 2 did meet, and after such meeting, did advise plaintiffs, through their attorneys, that the Dalzell School, which is the school where the children of the members of the class on whose behalf this action is brought, would be abolished, and that the students formerly attending the Delzell School would be zoned to the schools in respective areas of Sumter County wherein said group reside. That subsequently, on August 21st, 1953, the plaintiffs, through their attorneys, were advised that the Board of Trustees of Sumter County School District No. 2 complied with a directive of the Sumter County Board of Education, "In that the Dalzell Grammar School for Turks is to be operated as heretofore." That by this action of the Board of Trustees of School District No. 2, in refusing admission and enrollment to those represented in this class action to the white graded schools in the area in which they reside in said District, the defendants and their predecessors have established and are maintaining a policy, custom and usage of denying to the plaintiffs and others on whose behalf this suit is brought, the equal protection of laws by refusing to admit said children to the white elementary, grammar and graded schools in the various areas in the county in which they reside, said Trustees having refused such admission for enrollment arbitrarily, and the class for whose benefit this action is maintained are thus deprived of property without due process of law, and are denied equal protection of the laws.

IX

That the plaintiffs are informed and believe that registration and enrollment in Sumter County School District No. 2 for the 1953-54 school year commences on or about September 1st, 1953, and that irreparable damage will be done if the plaintiffs' children, and the children of those in that class for whose benefit this action is maintained, are not admitted to and enrolled in those white schools in Sumter County School District No. 2 to which they seek admission.

X

That in many instances the children belonging to the class for whose benefit this suit is brought live closer to those schools located in Sumter County School District No. 2, to which they have been denied admission, than they do to the Delzell School, which they are required to attend. That there are many other white children in said School District who are not members of the class for whom this suit is brought, who live closer to the Delzell School than to the school which they attend, but they are not required to attend said Dalzell School. That only members of the class for whom this action is maintained are required to attend, and have been in attendance at, said Dalzell School.

XI

That the plaintiffs are not negroes, and there is a tradition, commonly accepted by this group and the people generally, that they have descended from and are members of the Caucasian race, to-wit, the Turkish race, and the arbitrary and illegal refusal of the trustees, as heretofore set forth, to admit the children of the plaintiffs and other members of this group as students of the aforesaid white graded schools of said District has inflicted, and a continuation of this policy will continue to inflict, an irreparable injury upon them, placing them and their children at a distinct disadvantage in life, and the said policy, custom and usage maintained by the defendants, in requiring the said qualified children of this group to attend the school only attended by members of this class, coupled with the refusal to allow them to attend the white graded schools of said

District, amounts to a systematic denial of the equal protection of the Plaintiffs' and their childrens' rights under the Fourteenth Amendment to the Federal Constitution.

XII

There is between the parties an actual controversy as hereinbefore set forth, and the said defendants, by their illegal and wrongful acts, have damaged the plaintiffs and their said children, and a continuation of such conduct will continue to so damage them.

WHEREFORE, Plaintiffs respectfully pray the Court that upon filing this Complaint, as may appear proper and convenient, the Court advance this case on the docket and order a speedy hearing of this action according to law, and upon such hearing:

1. That this Court adjudge and decree and declare the rights and legal relations of the parties to the subject matter herein controverted, in order that such declaration shall have the force and effect of a final judgment or decree.

2. That this Court enter a judgment or decree, declaring that the policy, custom and usage of the defendants in refusing admission of the children of plaintiffs and all other members of this group as students, arbitrarily, is unconstitutional and violative of the Fourteenth Amendment of the United States Constitution.

3. That this Court issue a temporary restraining order, preliminary injunction, and permanent injunction, forever restraining and enforcing the defendants, and each of them, and their successors, from arbitrarily denying to the minor children of plaintiffs, and all others of said group, possessing the proper qualifications, admission to the white graded and grammar schools in Sumter County School District No. 2, in the areas in which they reside in said County and State.

4. That this Court allow the Plaintiffs their costs herein, and such further, additional or alternative relief as may appear to the Court to be just and equitable in the premises.

SCHWARTZ & SCHWARTZ,
RAYMON SCHWARTZ,
RAYMON SCHWARTZ, JR.

ANSWER TO AMENDED COMPLAINT

The defendants above named answering the amended complaint herein allege:

1. Upon information and belief, that the plaintiffs and those of the same class who are commonly known as "turks" are of a race different and distinct from the white race; that they have their own church, their own separate burying ground, that they have never mingled socially with the white people of their community, are not recognized as being of the white race, hold themselves out to be members of another race, and for many generations these plaintiffs and those of the same class have attended separate elementary schools. That the plaintiffs and those represented by them are of a different color from white people, are dark skinned, and are a mixture of Indian with other races.

2. That pursuant to article XI, Section 7 of the Constitution of South Carolina of 1895, and pursuant to Section 21-751 Code of Laws of 1952, provising as follows:

> "It shall be unlawful for pupils of one race to attend the schools provided by the Boards of Trustees for persons of another race."

These defendants by order of the County Board of Education of Sumter County, vested with authority by Statute law of South Carolina, under the provisions of Section 21-105, Code of 1952, and Section 21-230 of said Code, did direct and require the children of the plaintiffs and others in like situation to attend elementary school at Dalzell maintained for them by said school district, which said school has been attended by children of plaintiffs and others in like situation for many years, and that said acts were all authorized by law, and within the power of said Board.

3. That defendants admit under default order made by district court of the United States, certain of the race of the plaintiffs were admitted to the high school at Hillcrest, Sumter County, for the reason that no adequate facility was provided for said high school students and none could be provided, they being so few in number and it being impossible to maintain an accredited high school for said children, but denies that said order is *res judicata* as to the issues herein.

4. That defendants admit application was made for the admission of said children into the white schools of District No. 2 at Hillcrest and Shaw Heights grammar schools, but allege that the County Board of Education did order said children taught at the Dalzell School provided for them, that teachers were provided at said school and are in attendance daily at said school for the instruction of said students. Defendants deny that said action was arbitrary and allege upon the contrary that the same was within the provisions of the Constitution and Statute Law of South Carolina.

5. Defendants deny that irreparable damage will be done to plaintiffs or any persons in like situation, and allege upon the contrary that the school maintained by the defendants for the children of plaintiffs and others in like situation is an adequate school, having facilities equal to at least ¼ of the white schools of School District No. 2, and that the teachers at said school are duly qualified to teach under the law of this State, and are excellent teachers.

6. Upon information and belief these defendants allege that the mingling of the races represented by the plaintiffs and those in like situation with the white children of Hillcrest and Shaw Heights grammar schools will be detrimental to a greater number than the good, if any, which might follow the non-segregation thereof, and in all probability will result in the breaking down of the friendly relationship which has heretofore existed between the two races in the community in which they reside.

7. That it is provided in Section 20-7, Code of Laws of 1952, as follows:

> "It shall be unlawful (a) for any white man to intermarry with any woman of either the Indian or negro races or any mulatto, mestizo or half-breed, (b) for any white woman to intermarry with any person other than a white man or (c) for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; and any such marriage or attempted marriage shall be utterly null and void and of no effect. Any persons who shall violate any provision of this section shall be guilty of a misdemeanor and, on

conviction thereof, shall be punished by a fine of not less than five hundred dollars or imprisonment for not less than twelve months or both in the discretion of the court."

8. That said action of the said County Board of Trustees was taken only after due consideration of all phases of the matter; and pursuant to law, and authority of the State Board of Education, authorizing the maintenance of said school as a separate school for plaintiffs and those of their race.

WHEREFORE defendants having fully answered pray the judgment of the Court that the amended complaint be dismissed.

L. E. PURDY,
JOHN S. WILSON,
SHEPHERD K. NASH.

TRANSCRIPT OF HEARING ON MOTION FOR SUMMARY JUDGMENT PROCEEDINGS

The COURT: All right, what is the motion we have here?

Mr. MERRIMON: Your Honor, this is the motion that I wrote you about—Hood and others against the School Board of Sumter County—a motion for summary judgment.

The COURT: Go ahead and tell me about what your motion is.

Mr. MERRIMON: Well, Your Honor, this is a class action brought by the plaintiffs on behalf of themselves and all persons of their group similarly situated demanding that their children be admitted to the white graded grammar and elementary schools of District Number Two of Sumter County. They allege that they are citizens and residents of Sumter County; that they have applied for admission to these schools; and that they have been denied admission solely on the basis of race and color. They allege that they are Caucasian. The answer denies that they are members of the white race and that, under the Constitution and Statutes of South Carolina they have been re-

fused admission to the schools of this District Number Two. They admit that application has been made by them for admission and that admission has been refused on the ground that they are not members of the Caucasian race. But the answer admits that they belong to a class or a group commonly known as "Turks". I might say that the complaint alleges that they are not members of the Negro race. That allegation in the answer is not denied and there is no proof to that effect. Now this action was commenced, Your Honor, in 1953, July or August, I do not have the exact date right before me at the moment, July or August, 1953. It has been pending since. Now, so far as being entitled to the relief demanded in the complaint is concerned —why we think it perfectly obvious that there is hardly any room for argument about that. But Your Honor will note that the motion is made on two grounds—three grounds—the last two being somewhat the same. The first ground being the matter in *res adjudicata*, that by an Order passed by Your Honor in January of 1951, following a complaint on the part of other members of this group, brought on behalf of themselves and others in a similar situation in which they were denied admission to what is known as the Hillcrest High School, located in this District. Now that was a default case. I happen to know something about it. It was a default case because there was no defense. There was no High School in that District at that time provided for this group, or the children of this group which they could attend. That, I think, is true. But Your Honor's decree was not based on that ground. I have a certified copy of it here and it shows that the action was held to be unlawful because they were excluded on the basis of race and color. And Your Honor made the decree restraining the exclusion of the children from this High School and they have been since admitted to that High School. I may say in that connection, Your Honor, on the question of *res adjudicata* that, at the time of the action in which the decree which Your Honor has just read was made, the school district at which the plaintiff group at that time lived was known I believe as Number Nine. And the district in which the High School was located was

known as District Number 32 and that, since that time, the school districts of Sumter County have been reorganized and there are now only two school districts in the County; Number Nine and Number 32 now being a part of what is known as District Number Two; in which School District this plaintiff group now resides.

The COURT: All right, gentlemen, let's see where we are in this—you are making a motion here for summary judgment as I understand it?

Mr. MERRIMON: Yes, sir. Restraining these defendants from denying this plaintiff group and their children * * *.

The COURT: Now what are the facts upon which you base your right to summary judgment?

Mr. MERRIMON: Why, Your Honor, I base my claims to that summary judgment on the pleadings themselves.

The COURT: All right. Well, in most cases if you accept the complaint as true you would give judgment for the plaintiff. And probably in the same case if you accepted the answer as true you would give judgment for the defendant.

Mr. MERRIMON: Well, Your Honor, I don't think * * *.

The COURT: It conceivably can be that where an answer doesn't set up a defense and makes certain admissions that it would require judgment against the defendant. Now * * *

Mr. MERRIMON: The answer in this case admits that these children of this plaintiff group are excluded from these schools on the basis of race and color, claiming as the authority for such action on the part of the defendants provisions of the Constitution and Statutes of this State which say that there shall be no mxing of races in the schools. Now that is admitted in the answer. We say that that answer states no defense.

The COURT: Is that all it states?

Mr. MERRIMON: That is all they say in substance, yes, sir. Your Honor has the answer before you there. That is, in substance, all they say. They say, I believe, something to the effect that they are provided with an adequate school and that friendly relations have existed between these people whom they don't claim are Negroes but who they admit

are a group commonly known as "Turks"—that those relations will be disturbed by their admission to the white schools and that is about all they say in the answer as you will see. So Your Honor, we think it is perfectly apparent that there is no issue—no material issue of fact involved here whatever. The complaint alleges that these people have applied for admission of their children to these schools, that they are required to go to a segregated elementary grammar school, and that their admission to these schools has been denied, and denied on the ground of race and color. Now, the answer admits that. And, as Your Honor sees, that is all it does. And undertakes to justify that * * *

The COURT: It goes beyond that.

Mr. MERRIMON: And undertakes to justify the action * * * may I inquire, Your Honor, in what respect?

The COURT: Well, they allege that what you want done will cause irreparable injury to large classes of other people.

Mr. MERRIMON: Well, Your Honor, I * * *

The COURT: The Court isn't supposed to order something that does irreparable injury * * * just to give * * *

Mr. MERRIMON: I think Your Honor is mistaken about that.

The COURT: I am not mistaken. I am just telling you what they allege. I am not mistaken about what they allege—I know.

Mr. MERRIMON: The complaint alleges, Your Honor, that irreparable injury will be done to them if they are denied the right to attend these schools.

The COURT: Well, it may have been done * * *

Mr. MERRIMON: And then the answer says, in that regard, that irreparable damage * * * they deny that irreparable damage will be done to the plaintiffs.

The COURT: Paragraph 6?

Mr. MERRIMON: Yes, sir. They allege in the sixth paragraph it will be detrimental to a greater number than the good, if any, which might follow the non-segregation thereof, and will result in the breaking-down of the friendly relationship which has heretofore existed between the two races in the community in which they reside. Well, this,

Your Honor, is a motion for summary judgment and while we have attached no affidavits to it or proof of facts because we didn't consider there were any facts to be proved, it is somewhat different, of course, from a motion for judgment on the pleadings, which admits the allegations of the answer of the opposing pleading. And while we do not admit that allegation * * *

The COURT: On the basis of what is contained in the answer it would be utterly illogical to make it on that basis and then deny what is said in what you are basing it on.

Mr. MERRIMON: No, sir. If that were admitted, we say that that would be no answer. The settled law is that these children cannot be excluded from these schools on the basis of race and color. And there is no qualifications to that holding. Now then, the admission is that they are excluded on that ground. There is no law mentioned or statute with regard to any supposed results that may occur. I haven't read that in any of the * * *

The COURT: Well, you have got a lot of things to consider, Mr. Merrimon, besides the generalities with which you seem to be dealing. I think I may take notice, judicial notice, of the existence of State law. There is a law on the statute books now that says that there is no money to maintain a mixed school. Now you are predicating your mention —you come in with a double barreled proposition, that there is no difference in race in effect in contemplation of the racial issue, and then you claim privilege on the grounds that there is. It either is or isn't, I don't know. Now, it seems to me a fact should be pegged down one way or the other to know what is to apply. I can't adjudicate a case on the basis if this fact is so and so why then all right and if this fact is so and so, well then all right something else.

Mr. MERRIMON: No, sir, Your Honor, I'm not * * *

The COURT: That is an indefinite kind of judgment. Now I * * * you haven't mentioned it by name but I presume you refer to the Supreme Court opinion that was passed on the 17th of May in 1954.

Mr. MERRIMON: Yes, sir.

The COURT: In which they, for the first time, in effect, held that equality of treatment is discrimination. I think

that up until the Supreme Court held that, that any high school * * * normal high school child in the tenth grade would have known that that wasn't untrue * * * that that was untrue. But now the Court has in effect said that—that equality of treatment is discrimination. Then we must look for some form of law discrimination by some inequality. The inference of the Supreme Court decision is that you give the preference of course to the negro race. Because, in the question that they asked, and attached to their opinion, it was 4(a) I believe, asks for a consideration of the matter from the point of view only of the negro race—what will happen to the negro child and not what will happen to the white child. The white child is excluded from consideration in that question. So I presume that they were not concerned with the interests of the white child. We do have here a matter in which the Supreme Court, it seems to me, absolutely declined to construe the Constitution. They said so in effect that they were declining to construe it, they were not going to construe it, they were going to make it. They said you couldn't turn the clock back. Well, every six-year child that's lived in the home where there were clocks and he had access to them knows that that statement, as a physical matter, is untrue—that you can turn them back—just as I have turned them back as a child and you have too I have no doubt. So that statement, in that respect, in all fairness, must be regarded as a figurative statement which, if it means anything, means that they will not consider what those who proposed the Fourteenth Amendment had in mind that it meant; they will not consider what those who adopted the Fourteenth Amendment had in mind that it meant, when it was adopted; that they will not consider what those who were charged with the enforcement of it in all of the States that were then in the Union thought about it and put into practice insofar as its enforcement was concerned; they will not consider that. They say also that they will not consider what all the Courts for eighty-five years have said that this Constitutional provision meant. Now they say they won't turn the clock back, they won't consider that. They say that they will not respect the opinion of their predecessor Court. Now by what reasoning they

reach the conclusion that their opinion is entitled to more respect that their predecessors' opinion, I don't know. Or whether they expect it to be respected any more. But I know that is what they said, in their Opinion. Now * * * but what did they do? They said what we are going to do is, we are going to judge this thing—by what this ought to be—not what it is—but what it should be in our judgment. Based upon the thinking of a European Socialist, as supported by American left wingers. And one of the outstanding things in the writing of that European Socialist, a Swedish man, Mirdal, is his statement that the American form of Government is a conspiracy against the common man. Now that is who they turned to for light to state what the American system of Government should be, the only authority they cite. And who are these people that collaborated with Mirdal—practically every one of them has been cited by the Congressional unamerican Activities Committee as being affiliated with some left wing groups of one kind or character. One of them, I believe, as much as 28 times. Now, that naturally raises the question in my mind—and should raise it in a lot of other people's—has the Supreme Court the right to make a Constitutional change? They have refused to construe it, they have undertaken to make it, or change it. Who is it binding on? Applying to myself * * *

Mr. MERRIMON: Well, Your Honor, I * * *

The COURT: I took an Oath of Office. Did I take it to support the Constitution or to support the Supreme Court in its efforts to change it? I took it to support it.

Mr. NASH: As far as I am concerned * * *

The COURT: I don't think much of that opinion although they have * * * in its administration they throw out a threat as to what they will do to some of these little school board people—if the school board doesn't properly interpret what it means. And they didn't do it. They didn't interpret it as applied to the cases they had in hand. They sent them back for these boards to figure out what it was meant that they should do. Well, the race problem * * * they have not the power to legislate for the State, they have not the power to appropriate the State's money, I don't know, they may seize it. They haven't done it yet, haven't tampered with it

yet. So we are confronted now in the present situation, as far as I am concerned as a Judge as to whether I, as Judge, in trying to show some respect to the Supreme Court, am going to order the closing of the schools simply because the State is unwilling to provide the money for the kind of school that the Supreme Court says that they think they should have—you have either got to have that one or you can't have anything. Here the State comes along and says I am going to make these schools equal, I am going to make one just as good as the other as nearly as that is humanly possible, I am going to plan for them and I am going to put up the money for them. But not one penny will I put up for these mixed ones because I know the bad consequences that will flow from them. Now, what is posed to me is—shall I close up the schools?

MR. MERRIMON: Your Honor * * *

THE COURT: That are offering equal facilities to both groups. The Supreme Court can close them themselves as far as I am concerned. They passed the order. They can say there will be no school. I am not going to say it so long as the State offers equal facilities to all. Now, you have got this case here, coming back to it, in a strange situation. I don't know—it is said on the one hand that there is no difference in race in substance except that for the mere fact that a certain group is called "Turks". There have been some great Turkish people.

MR. MERRIMON: Well, Your Honor, I didn't think there was anything to argue about, myself.

THE COURT: So I don't know. It depends upon the facts in this case as to where these people are entitled to go. If they are not given ample facilities, equal facilities, I think they are entitled to them in some school. I don't know about that, that is a question of proof.

MR. MERRIMON: As I said, Your Honor * * *

THE COURT: But I don't think I can settle it on these pleadings from what I have read.

MR. MERRIMON: Well, I want to ask Your Honor to hear me in this matter now. I didn't think there was anything to argue about. Now I want to answer what you have had to say about it, if you please?

The COURT: Yes.

Mr. MERRIMON: Now I want to say first, Your Honor, that I am not here to undertake to dissect or question the decision of the Supreme Court of the United States. That is foreign, Your Honor, to any duty that I have. Nor am I called on to undertake to question the whys and wherefores of the decree made by the three judge court consisting of yourself, Judge Parker and Judge Dobie, rendered on the 15th day of July, this year; in which the Court held this—it is ordered that the decree heretofore entered by this Court be set aside and, in accordance with the decision and mandate of the Supreme Court, it is ordered, adjudged and decreed, that the provisions of the Constitution and laws of South Carolina requiring segregation of the races in the public schools are null and void because violative of the Fourteenth Amendment of the Constitution of the United States. And that the defendants be and they are hereby restrained and enjoined from refusing on account of race to admit to any school under their supervision any child qualified to enter such school from and after such time as they may have made the necessary arrangements for admission of children to such school on a non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause. I am not here, Your Honor.

The COURT: That is a repetition of the Supreme Court's opinion.

Mr. MERRIMON: That is the holding of the Supreme Court, that is the holding of this Court, accepting the decision of the Supreme Court as binding on it.

The COURT: In that case.

Mr. MERRIMON: Yes, sir. Well sir, the principle announced in that case applies in this case.

The COURT: I did not adopt it as my principle.

Mr. MERRIMON: It applies in any other like case, may it please the Court. It is the settled law as declared by the highest court of this land. I happen to be an officer of the Court. But, if I wasn't, I think it would be my duty, may it please Your Honor, to bow to the law as it is declared by the courts of this land. And, of all men, being a lawyer and worshipping at the shrine of the law as I have done these

forty-odd years, whether I agree with the Courts or not, as I often do not, I don't think that any man who has the capacity to think, and any sort of individual intellectuality, agrees with any man or any group of men all the time. But, Your Honor, when a Court renders a decision, whether I agree with it or not, I accept it and I bow to it. I conceive it to be my duty as a citizen to do it. And, if you would allow me to digress here just a moment now, before going into this case, since Your Honor has commented on the holding of the Court's, I think, sir, it is a dangerous thing for any group of people large or small to undertake to defy the decisions of our courts. Our courts are one of the foundation stones on which this Government rests that guarantee to us all protection to the rights and liberties of us all. And when our courts are gone—their decisions are hooted at and flighted, this country is on the way to the end. And nothing can result except rebellion and chaos and government by men instead of by law. And I say, sir, in my humble opinion, that it is the duty of every citizen to accept the decisions of the courts of the land. And, if those decisions are wrong, pass laws that will change them. But, until they are changed by proper authority, they stand as the law. Now those are my views, sir, about the decisions of the Courts in general. Now, to come back to this case, under the decision of the Courts, including this Court, these children, may it please Your Honor, I respectfully submit, are entitled to admission to these schools. They are on the pleadings in this case.

The COURT: I don't think on the pleadings. They may be, I don't say that they aren't. I don't know.

Mr. MERRIMON: Now then * * * Well, Your Honor, the pleadings simply say in short what we have both already said they say—that they are citizens of the District, they have applied for admission to the schools, they are required to go to a segregated school, and that they will be damaged in case they are denied the privilege which they claim is theirs, to be admitted to these schools. The answer admits * * *

The COURT: Let me ask you this * * * there is no school that they are permitted to go to?

Mr. MERRIMON: They have a segregated school there for these people, Your Honor, and have had for years.

The COURT: Nobody but them in it?

Mr. MERRIMON: Nobody except the members of this group. Now I want to have something to say, Your Honor, too, about the racial origin and status of these people as a race in a few moments. Now they are required to go to this * * *

The COURT: Let me get the facts first. You * * * as I understand then, in this School District Number Two, which we are dealing with here; is it Number Two?

Mr. MERRIMON: Number Two, yes, sir.

The COURT: That you have three types of schools.

Mr. NASH: That is right.

Mr. MERRIMON: Well, I don't know if you have three types of schools. You have a grammar school and you have a high school. Grammar or elementary schools and a high school. Now a separate grammar school has been maintained for this group. Now then, in the case that was brought in 1951 in which Your Honor made the decree which you have just read, they applied for admission to the high school and they were denied admission to the high school.

The COURT: Well, did they have more than one high school?

Mr. MERRIMON: They had only one high school in that district.

The COURT: In Number Two?

Mr. MERRIMON: In Number Two.

The COURT: Only one high school?

Mr. MERRIMON: Yes, sir.

The COURT: All the races go to the high school?

Mr. MERRIMON: Well, they * * *

The COURT: The same high school?

Mr. MERRIMON: I don't know if they had. I said they had one white school, one high school that I know of. Now there may be a high school there for colored people, or negroes, I don't know of it.

Mr. NASH: Oh, yes.

Mr. MERRIMON: In that district.

Mr. NASH: Right near the same place.

Mr. MERRIMON: There may be. But suppose there is one—that doesn't effect this situation in the slightest. These people have applied for admission to the white graded schools in the district for their group. And they have been denied that on account of race and color.

The COURT: Well, what I want to bring to your attention is, we have got a very peculiar situation here it seems to me, a little different from anything that I have run into before. Obviously, judging from what you say there would be segregation if there are three separate and distinct schools for three different races of people. But, if you only have two schools, then there would not be segregation in that sense in that they are kept away from everybody else except themselves if they were allowed to go to one of them.

Mr. MERRIMON: They are kept in a segregated school provided for them alone. They are not allowed to go to the white school, the white graded grammar schools. That is their complaint.

The COURT: Well, they are not complaining that they are not allowed to go to the negro schools?

Mr. MERRIMON: Well, they don't want to go to the negro schools. They are not complaining about that. I don't know whether they are allowed to go to the negro schools or not, they have never tried to go to the negro schools. They don't go to the negro schools and they wouldn't go to the negro schools I don't suppose. They don't associate with negroes. They are not negroes. I am going to have something to say about that, Your Honor.

The COURT: Well, the Supreme Court that you have so much respect for wants that to happen.

Mr. MERRIMON: Well, Your Honor.

The COURT: They want that to happen.

Mr. MERRIMON: I don't know what they want, Your Honor. All I know is what the decision says.

The COURT: Well, that is what I am going by is what the decision says.

Mr. MERRIMON: Now then, I want to call Your Honor's attention to these facts in this connection. In the first place, these people are of a racial origin I admit which is some-

what obscure. There are authorities, and I have a lot of it here, that they are members of the Caucasian race. They are commonly known as "Turks" as the pleadings show. This group has been in Sumter County since the Revolutionary War. It is said that they were brought here by * * * two of them or quite a few of the group by General Thomas Sumter. They fought with the white soldiers in the Revolutionary War. Now I have got the records here to bear out what I am saying. They have voted in all white elections. They have served on juries. They have gone to white schools without any order of court being necessary in order for them to have that privilege, too. And they are voluntarily admitted now, may it please Your Honor, to show you the inconsistency of these defendants; they are voluntarily admitted now into two other very small grammar schools in this very same district. While at the same time, they deny them admission to the better and larger white schools of that district.

The COURT: (To the Reporter) You needn't take the argument.

* * *

Mr. MERRIMON: That is nothing but an effort to blacken and try and discredit these people by trying to show that they are negroes or mixed up with negro blood. And the history of this group, sir, and the history of Sumter County shows to the contrary; as I show Your Honor. Answer to Interrogatory Number Eleven—Three teachers are employed at the Dalzell School. Now that is the school that these people are required to attend. Sixty-one of the plaintiff's race attend the Dalzell School. That is the school where they are really segregated. Five of the plaintiff's race attend the Wedgefield School; Wedgefield White School now mind you, and they attend it voluntarily, by voluntary admission on the part of these defendants of these children to that Wedgefield School. And one of the plaintiff's race attends the Brodgon School. And those are white elementary schools just of the same grade that these people now ask to be admitted into these schools. And nobody made them admit them, they admitted them voluntarily. And the record in this case shows, and it is so alleged

in the complaint, that this school board agreed to admit these children into these schools in the early part of the year 1953, when the question came up and application was made for them to do it or a discussion was had about it. And later on, at the insistence of the County Board of Education, they withdrew or rescinded that action, and notified the people that they would continue to maintain this segregated school at Dalzell for them. Now, in the Dalzell School there are sixty-one of these people. In the Shaw Heights School there is 316 white students. That is the graded school, an elementary school, one of the schools to which these children want to go. At the Hillcrest School, there is a graded school there also, as well as the high school, there is 272 white children in that school.

The COURT: How about the locality of these people with reference to these schools?

Mr. MERRIMON: Well, Your Honor, they are right there in the same area. These larger and better schools are right there in the district in which these children live.

The COURT: Oh well, I know the district. Presumably practically everybody that goes to school in a district lives in the school district unless it is an exceptional case where he is transferred from one school district to another.

Mr. MERRIMON: Well, sir, these schools are nearer to them * * *

The COURT: But where the district is large enough to require the maintenance of several schools it seems to me it might become a relevant factor as to whether or not a person was nearer one school or nearer another.

Mr. MERRIMON: Yes, sir. It is a large school district, sir.

The COURT: That is what I am asking about now.

Mr. MERRIMON: The schools that we have especial reference to are right in the area where these people reside, nearer to them than most of the other schools in the district.

The COURT: How about the school district—the school —you said something about a school being provided for them?

Mr. MERRIMON: Well, that is in this district, yes sir.

The COURT: Is that in the * * *

Mr. MERRIMON: That is in the area in which they live and just as near, possibly as some of the other schools to which they want to go. But it is a segregated school, provided for them.

The COURT: Is it nearer?

Mr. MERRIMON: It may be nearer. I don't know that it is any nearer than some of the other schools. I don't know that it is any nearer than the Hillcrest School or the Shaw Heights School.

The COURT: Well, I certainly don't. That is the reason I am asking the question.

Mr. MERRIMON: How is that, sir?

The COURT: I certainly don't.

Mr. NASH: All of that requires testimony, if Your Honor pleases.

Mr. MERRIMON: Your Honor, they are right there in that same area where it is nearer to them; some of the schools are nearer to them than the Dalzell School that they are required to go to. But that is not the question, Your Honor. They are not excluded because of convenience to them or inconvenience to somebody else. They are excluded on account of race.

The COURT: Now, Mr. Merrimon, I don't see that, upon what you have called to my attention here in the way of the pleadings, there is any sufficient basis for me to grant summary judgment. You mention a lot of things about which there seems to be some question. You are not in position to give the answers and of course it is not expected that you would be; you are a lawyer, you are not a witness.

Mr. MERRIMON: Well, what answers does Your Honor want? If I can answer any questions?

The COURT: Well, just to illustrate, that one, as to whether or not—I think where school trustees might direct that certain children go to school would depend a good deal on the distance they have to travel.

Mr. MERRIMON: No, sir, Your Honor, that is not the question in this case. They haven't done so in this case. They exclude these children on the grounds of race and color.

THE COURT: You are saying that. How do I know that?

MR. MERRIMON: Well, they say so themselves in their answer, sir.

THE COURT: Well, I don't read the answer to say all that you have argued by any means.

MR. MERRIMON: Now, I ask the Court this question—does the right of these children of this group to admission to these schools, the legal right depend on the question as to how near they live to the schools. If they are excluded on the ground of race and color, I respectfully submit to Your Honor that that can't be done whatever the distance is that they live from these schools. And that is the ground that they are excluded on and they are excluded on no other ground and it is not contended that they are excluded on any other ground. I don't care whether they live one mile or five miles or ten, they are excluded on the ground of race and color.

THE COURT: I would care whether they lived in one mile or ten.

MR. MERRIMON: Well, Your Honor * * *

THE COURT: I think it most unreasonable that they ask some child to go ten miles when they could send him to school at a distance of a mile.

MR. MERRIMON: Your Honor, when it comes to a matter of administration, sir, I would certainly agree with Your Honor. But that is not the ground on which they are excluded, Your Honor, from these schools. They are excluded on the ground of race and color. The answer so states and everything that they have said in their testimony so shows. And those Interrogatories are here, Your Honor can read them, you won't find anything in the answer to a single question propounded by either side that shows that these people were required to go to this segregated school because it was nearer or because it was convenient or because for some administrative reason. There is nothing in this case that shows otherwise than that they are excluded on the ground of race and color. Although they don't even claim that they are negroes and they couldn't prove it if they tried, which they won't undertake to do.

(Mr. Merrimon handed the Court a paper.)

Mr. MERRIMON: That is a sketch, sir, as to where the people live with respect to the schools and I am informed that the vast majority of them live nearer to the Shaw Heights School and the Hillcrest School, which are two of the largest graded and grammar schools in this district, than they do to the Dalzell School which they are required to attend. I just handed you that little rough diagram there. Here is the Hillcrest School, here is the Dalzell School, here is the Shaw Heights School and here is where the people live.

The COURT: I think that is of significance. The only thing I was mentioning, it didn't appear from anything of record before me so far as I know.

Mr. MERRIMON: We submit, Your Honor, that . . .

The COURT: Now I notice throughout your complaint here which I have just read over briefly, skimmed it, that the complaint of the plaintiffs here seems to be that they are not permitted to attend the white school.

Mr. MERRIMON: Yes, sir.

The COURT: Which is another way of contradicting your argument for a mixed school.

Mr. MERRIMON: Contradicts my argument, Your Honor, is what way?

The COURT: For a mixed school. You have been arguing for mixed schools. Now, if we reach the conclusion, as alleged in this complaint, that these people are Caucasian, and for the sake of the argument I assume they are although I do not know anything personally myself, then they properly would, from even the defendants' standpoint, be legitimate students for the white schools.

Mr. MERRIMON: Now, Your Honor, if you will allow me . . .

The COURT: But how your argument that they, being white, should be admitted to white schools, is supported by your argument for mixed schools, I don't see.

Mr. NASH: They are already in a white school if that state of facts be correct.

Mr. MERRIMON: Your Honor, I will answer your question. It is alleged, it is true, that they are Caucasians in the complaint. That is entirely an immaterial allegation.

That is my answer. It don't make any difference what their race is. We say they are Caucasians. They deny it. But in reply to that then we say we don't care what race they are members of—they are entitled under the law to admission to these schools. Now that is an unanswerable answer I respectfully submit to the Court. As to their race, it is a matter of history, Your Honor, it doesn't rest on what a few disgruntled people say, who have made affidavits in this case.

THE COURT: Well, the plaintiff says . . .

MR. MERRIMON: And answered Interrogatories, it doesn't depend on that. It is a matter of history, the origin of this racial group. Now, as I say, they were brought here, according to the legends, by General Thomas Sumter during the Revolution.

THE COURT: I have read a good deal about that, Mr. Merrimon. I think it is very interesting history.

MR. MERRIMON: It is, Your Honor and I would like to show you something further on it if you will allow me to.

THE COURT: I really haven't the time to indulge my interest in that particular phase of it.

MR. MERRIMON: Well let me tell you, Your Honor just simply this then . . .

THE COURT: At this time.

MR. MERRIMON: I have records here of the United States Government which show that they have been accepted by it as white; the marriage license records show them as white.

THE COURT: Well, maybe so.

MR. MERRIMON: And that they have attended white schools; at least one of them in this state, I think, went to Clemson College.

THE COURT: Well, accept that to be true.

MR. MERRIMON: And I have here sir, the history of Sumter County recently published at the instance of the Library Board of Sumter County, written by Doctor Anne K. Gregory who was a curator of the S. C. Historical Society.

THE COURT: Well, I wouldn't have time to read that history today, Mr. Merrimon.

Mr. MERRIMON: Which shows the origin of these people. A whole chapter is devoted to them in there.

The COURT: I suspect it is substantially the same as I have read before. You are asking that the Court hold that they are entitled to enter white schools. Now that is what you pray for. Which, in effect is asking me to put them in a segregated school—change them from one segregated school to another segregated school. That is what your complaint asks.

Mr. MERRIMON: No, Your Honor, I say we are asking . . .

The COURT: Now, if I don't do that—say well, I can't go that far—suppose I should agree with you and say I would order them entered into an unsegregated school, into a mixed school. And suppose the Board, in compliance with that would put them in a negro school, that would mean a mixed school.

Mr. MERRIMON: No, sir, that is not our position, Your Honor. If you will let me explain.

The COURT: Well, I know that isn't your position.

Mr. MERRIMON: We say that they have a right to go to any school in that district.

The COURT: No, you are asking that they allow them to go to the white school.

Mr. MERRIMON: As a matter of law.

The COURT: That is what you are asking.

Mr. MERRIMON: Well sir, we say they are entitled to go to a white school.

The COURT: Now, suppose I should go beyond that and say that no, the Board has a right to regulate the schools, control their operation; you can't leave it to this pupil and the other pupil and any and all of the pupils or any and all of the parents to run the schools as they want them, you have got to have supervision. So, we will say that you can't put them in a segregated school, you must put them in a mixed school. Then literally the order would be complied with if they are put into the negro school.

Mr. MERRIMON: Your Honor, if you will allow me . . .

The COURT: Unless it be admitted that they themselves are negroes which you aren't willing to admit and I don't

suggest that you do admit it. I think people ought to take pride in their race, whatever it may be.

MR. MERRIMON: Well, these people do and I think justly so, sir.

THE COURT: And I appreciate people who do do that. But we certainly would'nt then run into the segregated school issue, you would certainly have a mixed school. And I don't know how far the Supreme Court in its legislative policies is going—whether it is going to say that we have got to have some of every race in our schools, whether mixing two would be sufficient to meet their requirements or whether we must have three, four, or one of every race. But, as this thing confronts us now, what they are apparently driving at is the mixing of the white and the negro races. When they get that accomplished, that will be the present end.

MR. MERRIMON: Your Honor, we are not concerned . . .

THE COURT: I believe that will be met, clearly, if I make these Turkish people go with the negroes—there will be a mixed school all right. And nobody can say it wouldn't be unless they can say that these Turkish people are not in fact Turkish people; which I certainly have nothing before me to warrant me saying that, so far.

MR. MERRIMON: Well, Your Honor, I don't want Your Honor to misunderstand my position or the position of these plaintiffs. That is, that they are denied admission to the white graded grammar and elementary schools of this district.

THE COURT: That is what you say.

MR. MERRIMON: And they demand the right to be allowed to go to those schools. They don't ask that they be segregated in those schools or segregated in any other school. They merely claim that they cannot be denied the right to go to those schools on the ground of race or color. That is the issue in this case. And that is the ground which they are denied admission on. Now that is the very simple issue, I respectfully submit, in this case. And, in connection with that issue that matter—there is no issue about it—it is an admitted fact it is not that they want to be segregated in white schools or segregated in any schools, they

are segregated in a school now. But their position is that they can't be segregated in any school whatsoever and that they have a right to go to any school of their choice in that district, so far as race and color is concerned, and they can't be excluded from any on the ground of race and color. And they are excluded from these on that ground. And they ask that the defendants be restrained from that exclusion.

The COURT: Even taking the Supreme Court's opinion at its fullest, that would allow, where you had three groups, one of the groups to shuttle at their pleasure from one school to another month by mouth, which would be disrupting and destroying school advantages for everybody. It is inconceivable that the Supreme Court could have possibly meant that. I understand now that the school * * *

Mr. MERRIMON: Your Honor what does it mean if it did not mean that no child can be denied admission to a school because of race and color.

The COURT: That is a different thing from saying * * *

Mr. MERRIMON: I think that is what Your Honor * * *

The COURT: Any child has a right to select the school to which he will go. Letting him select the school to which he will go and denying him the right to go to a school are two different things.

Mr. MERRIMON: Yes sir, and that is what they do here. They are denying the right to go to the school because of race and color.

The COURT: Well, gentlemen, I will have to forego any further consideration of this matter at this time. When I can get the time, I will be very glad to set a day and hear such testimony as each side has.

Mr. MERRIMON: Well, Your Honor, what issue of fact is it that you want proof on?

The COURT: I want you to prove your case if you have one.

Mr. MERRIMON: We say that there is no material issue of fact in the case.

The COURT: All right, if there is no material issue.

Mr. MERRIMON: We say that there is no material issue of fact in the case.

The COURT: Well, suppose you let one of talk at the time a little bit, Mr. Merrimon.

Mr. MERRIMON: I beg your pardon, sir.

The COURT: You don't have to yell so loud anyway. I can hear you without the man across the street hearing you.

Mr. MERRIMON: Yes, sir.

The COURT: I suggest that you gentlemen get together and stipulate all absolute facts in this case that are material. And sign that stipulation. If there is admissions of fact that you think should be admitted or that the other side thinks should be admitted, they may serve the other under the rules of the Court with Requests for Admissions. If there are obvious facts that ought to be settled, agreed to, and one side or the other forces his adversary to come in and prove something that he has no intention of disproving or means of disproving, causes delay and expense, well charge it to the one causing it. Now let's use the means of discovery and get the facts here and maybe there won't be anything that we need further than what is developed. All that I have at present before me is the pleadings and your motion. I do not find that that is sufficient to grant * * *

Mr. MERRIMON: Your Honor, it has always been my understanding that you did not have to prove what was admitted. And they admit the exclusion of these children from these schools on the grounds of race and color.

The COURT: Yes, and by the same token, one doesn't have to prove what is alleged if they are willing to accept it. The defendant may take what one alleges in his complaint without proof * ** or put the plaintiff to proof of all allegations.

Mr. MERRIMON: Well, Your Honor, what is the status of this matter now.

The COURT: I am refusing your motion for summary judgment. I will be glad to give you a hearing on the main matter at such time as I am able to find time to do it.

ORDER
C/A 3880

On December 19, 1955, I heard a motion on behalf of the plaintiffs in the above entitled case for summary judgment. The motion seems to have been based upon the pleadings. I am of the opinion that the motion should be denied, and it is so ORDERED.

This 21st day of December, 1955.

GEORGE BELL TIMMERMAN,
United States District Judge.

EXCERPTS FROM INTERROGATORIES AND ANSWERS OF SCHOOL SUPERINTENDENT

* * *

Q. Are members of the class commonly referred to as Turks, in the Northwestern section of Sumter County, in attendance at any of these schools, and if so, how many of said group have attended each of these schools during the current school year?

A. Eleven (11) of the plaintiffs' race attend Hillcrest High School grades 9-12; Sixty-one (61) of plaintiffs' race attend Dalzell School; (5) of plaintiffs' race attend Wedgefield School; One (1) of plaintiffs' race attends Brogdon School.

Q. Was it not the opinion of the governing Board of Trustees of School District No. 2, in the latter part of July, 1953, that the class commonly referred to as Turks should be admitted to all of the schools for white children in School District No. 2, as is evidenced by letter of Mr. Hugh T. Stoddard, of July 31st, 1953, to the attorneys for Plaintiffs, stating that "students formerly attending the Dalzell School would be zoned to the schools in that area of the county for the 1953-54 session?

A. (Objection—no answer.)

Q. If the members of the class known as Turks were acceptable at that time, have they, as a class, or as individual members of a class, done anything to make them unacceptable?

A. Nothing to the knowledge or information of defendants.

ORDER OF DISTRICT JUDGE ASHTON H. WILLIAMS MODIFYING RESTRAINING ORDER

It appearing from the affidavit of Hugh T. Stoddard, Superintendent of School District No. 2, filed herewith, that many complications and much confusion will arise by virtue of my order dated August 31st, 1953, in the transfer of the pupils of one school to two or more other schools, in the zoning of said pupils, the allocation of said pupils to other schools, the rerouting of bus schedules, the placement of pupils in proper classes, and other matters, none of which facts were known to the Court, and probably not to counsel for plaintiffs, or to plaintiffs themselves, and under any circumstances, the orderly integration of said pupils in other schools would be for the best interest of said school system, it is

ORDERED That my Order dated August 31st, 1953, herein, be modified by eliminating the mandatory provisions thereof pending the further Order of the Court.

ASHTON H. WILLIAMS,
U. S. District Judge.

Charleston, S. C.,
September 2nd, 1953.

28/37

No. 248

BRIEF OF APPELLEES

Office - Supreme Court
FILED
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JOHN T. FEY, C

United States Court of Appeals

FOURTH CIRCUIT

No. 7163

WOODROW W. HOOD, PEGGY ANN HOOD, LEVER RAY, IRMA RAY, HENRY LOWREY, AND RUTH LOWREY, APPELLANTS,

versus

BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, SUMTER COUNTY, SOUTH CAROLINA, J. E. MAYES, JR., CHAIRMAN OF SAID BOARD, H. E. KIRVEN, C. W. GOODMAN, W. T. BROGDON, J. ELBERT DAVIS, JR., MEMBERS OF SAID BOARD, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

FILED

MAR 23 1956

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

STATEMENT

This action was commenced on the 31st day of August, 1953. The action is a class action, praying the court for a declaratory judgment, and for a temporary restraining order, a preliminary injunction, and a permanent injunction restraining the defendants from denying to the children of plaintiffs and all others of their group, possessing

proper qualifications, admission to the white graded and grammar schools in Sumter County School District No. 2.

The amended complaint further alleges that the class or group to which the plaintiffs belong have been looked upon and treated, in all public relations, as white persons, "which plaintiffs allege they are."

The answer set up that the plaintiffs belong to some race other than the white race, denies that any damage will be suffered by plaintiffs' children or any person in like situation, that the co-mingling of the children of the plaintiffs and others in like situation in the schools which they seek to attend, would be detrimental to a greater number than the good, if any, which might follow the admission of said children to the said schools, and would in all probability result in the breaking down of the friendly relationship which had theretofore existed between the two races in the community in which they reside.

Judge Williams of the District Court for the Eastern District of South Carolina issued an *Ex Parte* order granting the preliminary injunction, but on hearing revoked the same, from which order no appeal was taken.

Motion for summary judgment was made in behalf of the appellants before Judge Timmerman, who, by his order, filed December 21, 1955, denied said motion. This appeal comes from the order denying the motion for a summary judgment.

ARGUMENT

We apprehend that there are two issues involved in this appeal, which may be stated as follows:

I

Is the order denying summary judgment an appealable order?

II

Is there a remedy provided, which must be exhausted before this action can be maintained?

I

Is the order denying summary judgment an appealable order?

We respectfully submit that an order denying summary judgment is not appealable except in certain cases not applicable here.

Metal Furniture Company v. U. S., C. A. (2d) 149 F. (2d) 130;

Drittel v. Friedman, C. A. (2d) 154 F. (2d) 653;

Jones v. St. Paul Fire & Marine Ins. Co., C. A. 5 108 F. (2d) 123;

John Hancock Mut. Life Ins. Co. v. Kraft, C. A. (2d) 200 F. (2d) 952;

Dutton v. Cities Service Defense Corp., C. A. 8th 197 F. (2d) 458;

McGrath v. Hunt, Hill and Betts, C. A. (2d) 194 F. 529;

Morgenstern Chemical Co. v. Schering Corp., C. A. (3rd) 181 F. 160;

Atlantic Co. v. Citizens Ice & Cold Storage Co., C. A. 5th, 178 F. (2d) 453 (Certiorari denied, 70 S. Ct. 841, 339 U. S. 953, 94 L. Ed. 1365).

It may be argued, however, that since the order denying summary judgment was, in effect, an order denying injunctive relief, an appeal from such order would lie under

Section 1292 (1) U. S. C. A. Title 28 as amended, which provides that: "Courts of Appeal shall have jurisdiction of appeals from:

> "Interlocutory orders of district courts of the United States * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions * * *"

That there is a controversy of fact which has not been disposed of by the court below is obvious. Appellants in paragraph 6 of their amended complaint allege:

> "That the members of the group or class to which the plaintiffs belong have for many years been looked upon and treated, in all public relationships, **as white persons, which plaintiffs allege they are.**"

If the plaintiffs are white persons, as they allege, no question arises which would give this court jurisdiction.

Reverting to the anticipated argument of appellants, that the effect of the denial by the District Judge of an order of summary judgment, is to refuse an injunction and therefore an appealable order under Section 1292 (1) Title 28 U. S. C. A., the case of *Morgenstern Chemical Co., Inc., v. Schering Corp., supra*, says this:

> "The denial of summary judgment in the court below has no comparable significance. The court has not reached, much less decided, the merits of plaintiff's claim for injunction. The motion for summary judgment is not an application for a preliminary injunction. Nothing has occurred in or as a result of the denial of the motion which precludes plaintiff from seeking a temporary injunction in accordance with established procedure if he believes immediate injunctive relief is necessary and proper. Plaintiff is merely relegated to the normal procedure of trial which would have been the only procedure before the adoption of Rule 56. In terms of the issues of the present case, the effect of the court's decision is merely to require the submission of additional evidence before the court

will undertake to determine whether two trademarks are confusingly similar. In character and impact the court's action was not greatly different from an order continuing a cause already calendared for trial until some future date in order that additional witnesses may be called.

It follows that the order below lacks the potential of drastic and far reaching effect on the rights of the parties which is characteristic of orders which decide the propriety of granting or refusing injunctions. Such potential supplies the rational basis for the incursion upon the general policy proscribing interlocutory appeals in the exceptional situations covered by Section 1292. This view has recently been expressed by the Supreme Court in its statement that Section 1292 indicates 'the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties.' *Cohen v. Beneficial Indus. Loan Corp.*, 1949, 337 U. S. 541, 545, 69 S. Ct. 1221, 1225. Similarly, in this circuit we have said, "The manifest purpose of the statute is to enable a litigant to seek prompt review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far reaching in effect.' *Maxwell v. Enterprise Wall Paper Co.*, 3 Cir., 1942, 131 F. (2d) 400, 402. Thus, to construe Section 1292 as applicable to the present order would unnecessarily divorce the meaning of the language used from its apparent purpose" * * *

"It is not enough merely to have discovered that the order can be found not to have granted an injunction. Its essential character and effect must be determined.

Two other factors deserve mention. The rules of Civil Procedure were not intended to broaden the scope of review of decisions of district courts. Cf. *United States v. Sherwood*, 1941, 312 U.S. 584, 61 S. Ct. 767, 86 L. Ed. 1058." * * *

"We are satisfied that the order appealed from is not an order refusing an injunction within the meaning of Section 1292 (1).

The appeal will be dismissed."

See also:

Albert v. School District of Pittsburg et al., C. A. (3d.) 181 F. (2d) 690.

In the case of *Slick Airways, Inc., v. American Airlines, Inc. et al.*, 204 F. (2d) 230 (C. A. 3rd), the court says:

"In addition, this case involves our rationalization of the 'refusing an injunction' clause of Section 1292 (1), elaborated in *Morgenstern Chemical Co. v. Schering Corp.*, 3 Cir., 1950, 181 F. (2d) 160. There we analyzed an order denying a motion for summary judgment as merely causing a postponing of decision on issues until later in the lawsuit. Therefore, it lacked that substantial effect upon the rights of the parties which would be necessary to bring it within the policy of Section 1292 (1) in favor of a restricted group of interlocutory appeals. Thus, there was nothing to justify any broad construction of the language of the statute to cover such a situation. Similarly, in the present case the court has declined to stop the proceeding at this early stage, yet has made it clear that the request may be renewed and will be considered again before trial if the moving party so desires after pretrial clarification of issues. Thus, this case, like the *Morgenstern case*, is as far outside of the policy of Section 1292 (1) as it is beyond the literal provisions of that subsection. We have no authority to entertain this interlocutory appeal."

See also *District 65, Distributive, Processing and Office Workers Union of N. Y. and N. J., formerly local 65 et al. v. McKague et al.*, 216 F. (2d) 154.

Hook v. Hook & Akerman, Inc., C. A. 3, 213 F. (2d) 122.

Division 689 Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, A.

F. L. v. Capital Transit Company, C. A. D. C., 227 F. (2d) 19.

II

Is there a remedy provided which must be exhausted before this action can be maintained?

Printed as appendix to this brief is the Act of the General Assembly of South Carolina, ratified on the 6th day of March, 1956, and approved by the Governor of South Carolina on the 8th day of March, 1956.

The State Courts of South Carolina are entirely capable of adjudicating the issue of fact as to the race of appellants, and no constitutional question is involved in the decision of that issue.

It is well settled that the Federal Court will not grant injunctive relief until the remedies provided by State law have been exhausted. *Myers v. Bethlehem Corp.*, 303 U. S. 41, 51; *Natural Gas Company v. Slattery*, 302 U. S. 300, 310-311.

The Statutes relating to schools and remedies provided to any pupil aggrieved (printed in the appendix hereof) are substantially similar to the North Carolina Statute which is the basis of the decision in the case of *Carson v. Board of Education of McDowell County*, 227 F. (2d) 789. In that case this court held that the District Judge should give consideration to the subsequent legislation of the State of North Carolina providing remedy for persons feeling aggrieved with respect to their enrollment in public schools of that State.

This court held:

> "This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have power to do in the premises is to enjoin vio-

lation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in *Matthews v. Rodgers, supra* (284 U. S. 525) 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal court, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal rights may be preserved without it' ".

CONCLUSION

We therefore respectfully submit:

1. That the order appealed from is not an appealable order and the appeal should be dismissed.

2. That if the order appealed from should be an appealable order, following *Carson v. McDowell, etc., supra*, the court should remand the case to the District Court with instructions.

Respectfully submitted,

SHEPARD K. NASH,
JOHN S. WILSON,
L. E. PURDY,
Attorneys for Appellees.

APPENDIX

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"A"

ACT NO. 55, ACTS AND JOINT RESOLUTIONS OF SOUTH CAROLINA OF 1955

AN ACT TO AMEND SECTION 21-230 CODE OF LAWS OF SOUTH CAROLINA RELATING TO THE GENERAL POWERS AND DUTIES OF SCHOOL TRUSTEES, SO AS TO FURTHER PROVIDE THEREFOR, ETC.

BE IT ENACTED by the General Assembly of the State of South Carolina:

* * *

Section 2: Subsection (7) Section 21-230 Code of Laws of South Carolina, 1952, is amended by striking out the entire subsection and inserting in lieu thereof the following:

"(7) Manage and control local educational interests of its district, with the exclusive power to operate or not operate any public school or schools;"

Section 3. Section 21-230, Code of Laws of South Carolina, 1952, is amended by adding after subsection (8) the following, which shall be known as subsection (9):

"(9) Transfer any pupil from one school to another so as to promote the best interest of education and to determine the school within its district in which any pupil shall enroll".

"B"

AN ACT

TO AMEND SECTION 21-103 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1952, RELATING TO THE DETERMINATION OF LOCAL CONTROVERSIES AND APPEALS FROM COUNTY BOARDS OF EDUCATION, SO AS TO PROVIDE FOR APPEALS FRM DECISIONS OF BOARDS OF TRUSTEES TO COUNTY BOARDS OF EDUCATION AND APPEALS FROM COUNTY BOARDS OF EDUCATION TO THE COURTS, AND TO AMEND SECTION 21-46 OF THE CODE OF LAWS OF

SOUTH CAROLINA, 1952, RELATING TO THE POWERS AND DUTIES OF THE STATE BOARD OF EDUCATION SO AS TO ELIMINATE THEREFRM ALL REFERENCES TO APPEALS FROM COUNTY BOARDS OF EDUCATION.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 21-103 of the Code of Laws of South Carolina, 1952 is hereby amended by striking the entire Section and substituting in lieu thereof the following:

"Section 21-103 (1) Subject to the provisions of Section 21-230, as amended, any parent or person standing *in loco parentis* to any child of school age, the representative of any school or any person aggrieved by any decision of the Board of Trustees of any school district in any matter of local controversy in reference to the construction or administration of the school laws or the placement of any pupil in any school within the district, shall have the right to appeal the matter in controversy to the County Board of Education by serving a written petition upon the Chairman of the Board of Trustees, the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which a copy of the order or directive of the Board of Trustees was delivered to him by mail or otherwise. The petition shall be verified and shall include a statement of the facts and issues involved in the matter in controversy. The parties shall be entitled to a prompt and fair hearing by the board which shall try the matter *de novo* and in accordance with its rules and regulations. Where individual children of school age are involved in the matter in controversy, the case of each child shall be heard and disposed of separately.

"Section 21-103 (2). After the parties have been heard, the County Board of Education shall issue a written order disposing of the matter in controversy, a copy of which shall be mailed to each the parties at interest and any party aggrieved thereby shall have the right to appeal to the Court of Common Pleas of the county by serving a

written verified petition upon the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which copy of the order of the County Board of Education was mailed to the petitioner. The parties so served shall have twenty (20) days from the date of service, exclusive of the date of service, within which to make return to the petition or to otherwise plead, and the matter in controversy shall be tried by the circuit judge, *de novo*, with or without reference to a master or special reference; *provided*, that the County Board of Education shall certify to the court the record of the proceedings upon which its order was based, and the record so certified shall be admitted as evidence and considered by the court, along with such additional evidence as the parties may desire to present. The courts shall consider and dispose of the cause as other equity cases are tried and disposed of, and all parties at interest shall have such rights and remedies, including the right of appeal, as are now provided by law in such cases.

"Section 21-103 (3). In counties where the functions of the Boards of Trustees and those of the County Board of Education have been combined, the appeal provided in Section 21-103 (1) shall lie to the County Board of Education from its original action disposing of the matter in controversy before hearing.

"Section 21-103 (4). At any hearing provided for in Section 21-103 (1), the parties may appear in person or through an attorney licensed to practice in South Carolina and may submit such testimony, under oath,—— or other evidence as may be pertinent to the matter in controversy.

"Section 21-103 (5). The County Board of Education may designate one of its members to conduct any hearing provided for in Section 21-103 (1) and report the matter to the board for determination.

"Section 21-103 (6). Until the matter in controversy has been finally disposed of, no appeal shall act as a supersedeas or suspension of the order of the board having original jurisdiction of the cause."

SECTION 2. Amend Section 21-46 of the Code of Laws of South Carolina, 1952, by striking therefrom the last two sentences so that said Section shall, when amended, provide as follows:

"The State Board of Education shall constitute an advisory body with whom the State Superintendent of Education shall have the right to consult when he is in doubt as to his official duty."

SECTION 3. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 4. All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 5. This Act shall take effect upon its approval by the Governor.

In the Senate House the —— day of March 6, 1956

In the Year of Our Lord One Thousand Nine Hundred and Fifty-six.

ERNEST F. HOLLINGS
President of the Senate.

SOLOMON BLATT,
Speaker of the House of Representatives.

Approved the 8th day of March 1956.

GEORGE BELL TIMMERMAN, JR.,
Governor.